No. 95-1726-CFY Title: United States, Petitioner
v.
George LaBonte, Alfred Lawrence Hunnewell, and Stephen Dyer

Docketed:
April 24, 1996 Court: United States Court of Appeals for the First Circuit

Entry	Date	Proceedings and Orders
	Apr 23 1996	Petition for writ of certiorari filed. (Response due May 24, 1996)
	Apr 23 1996	Appendix of petitioner filed.
	May 22 1996	Brief of respondent Alfred Hunnewell in opposition filed.
	May 22 1996	Motion of respondent Alfred Hunnewell for leave to proceed in forma pauperis filed.
	May 22 1996	Brief of respondent George LaBonte in opposition filed.
	May 22 1996	Motion of respondent George LaBonte for leave to proceed in forma pauperis filed.
	May 23 1996	Motion of respondent George LaBonte for appointment of counsel filed.
	May 24 1996	Motion of respondent Alfred L. Hunnewell for appointment of counsel filed.
	Jun 5 1996	DISTRIBUTED. June 21, 1996
	Jun 5 1996	Motion of respondent Stephen Dyer for leave to proceed in forma pauperis filed.
	Jun 10 1996	Motion of respondent Stephen Dyer for appointment of counsel filed.
	Jun 24 1996	Motion of respondent Alfred Hunnewell for leave to proceed in forma pauperis GRANTED.
	Jun 24 1996	Motion of respondent George LaBonte for leave to proceed in forma pauperis GRANTED.
	Jun 24 1996	Motion of respondent Stephen Dyer for leave to proceed in forma pauperis GRANTED.
	Jun 24 1996	Petition GRANTED. SET FOR ARGUMENT January 7, 1997. **********
	Jul 9 1996	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
	Aug 1 1996	Motion for appointment of counsel GRANTED and it is ordered that John A. Ciraldo, Esquire, of Portland, Maine, is appointed to serve as counsel for the respondent George LaBonte in this case.
	Aug 1 1996	Motion for appointment of counsel GRANTED and it is ordered that Michael C. Bourbeau, Esquire, of Boston, Massachusetts, is appointed to serve as counsel for the respondent Alfred L. Hunnewell in this case.
	Aug 1 1996	Motion for appointment of counsel GRANTED and it is ordered that Peter Goldberger, Esquire, of Ardmore, Pennsylvania, is appointed to serve as counsel for the respondent Stephen Dyer in this case.
	Aug 8 1996	Brief of petitioner United States filed.
	Aug 15 1996	Order extending time to file brief of respondent on the merits until October 4, 1996.
	Aug 15 1996	Record filed.

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No. 95-1726-CFY

Entry	Date	Proceedings and Orders
	Sep 5 1996	Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
	Oct 3 1996	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Oct 4 1996	Brief of respondents George LaBonte, Alfred Hunnewell and Stephen Dyer filed.
	Oct 7 1996	LODGING consisting of one copy of a memorandum dated 9/30/96 and a copy of the resondents' brief filed in the Court of Appeals
	Nov 12 1996	Reply brief of petitioner United States filed.
	Nov 20 1996	CIRCULATED.
	Dec 4 1996	Record filed.
	Jan 7 1997	ARGUED.
	Jan 9 1997	Motion of respondent Stephen Dyer to dismiss writ of certiorari as improvidently granted filed.
	Jan 13 1997	DISTRIBUTED. January 17, 1997 (Page 19)
	Jan 14 1997	Opposition of United States to motion of respondent Stephen Dyer to dismiss writ of certiorari as improviden filed.

95-1726

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE,
ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders.

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GEORGE LABONTE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-53a) is reported at 70 F.3d 1396. A prior opinion of the court of appeals affirming David E. Piper's conviction is reported at 35 F.3d 611, and a prior opinion affirming respondent Dyer's conviction is reported at 9 F.3d 1. The prior opinions of the court of appeals affirming the convictions of respondents LaBonte and Hunnewell are unreported, but the judgments are

noted at 19 F.3d 1427 (Table) and 10 F.3d 805 (Table), respectively. The order of the district court denying LaBonte's motion for resentencing (App. 54a-66a) is reported at 885 F. Supp. 19. The orders of the district court denying Hunnewell's and Piper's motions for resentencing (App. 71a-72a, 73a-108a) and Dyer's motion under 28 U.S.C. 2255 (App. 67a-70a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1995. A petition for rehearing was denied on January 24, 1996. App. 109a-113a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION AND SENTENCING GUIDELINE INVOLVED

The following provisions are set forth in an appendix to this petition: 28 U.S.C. 994(h), and Sentencing Guidelines § 4B1.1 (Nov. 1, 1995), with accompanying Commentary.

STATEMENT

Respondents George LaBonte, Alfred Lawrence Hunnewell, and Stephen Dyer, as well as defendant David E. Piper, were convicted of federal controlled substance offenses in the United States District Court for the District of Maine. Before November 1, 1994, each of the four was sentenced as a career offender under Sentencing Guidelines § 4B1.1 (Nov. 1, 1993). The court of appeals affirmed each defendant's conviction and sentence. Subsequently, each defendant filed a motion seeking a reduction in his sentence based on an amendment to the career offender provision of the Sentencing Guidelines promulgated

by the United States Sentencing Commission, effective November 1, 1994. In two of the cases, the district court found that the amendment was contrary to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, and refused to apply it. In the other two cases, another judge of the same district court found that the amendment was valid. The court of appeals consolidated the ensuing appeals. A divided panel of the court of the appeals upheld the amendment, and affirmed in part, reversed in part, and remanded.

1. In 1984, Congress created the United States Sentencing Commission and charged it with the responsibility to promulgate sentencing guidelines for the federal system. See 28 U.S.C. 991; *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). In addition to articulating general goals for federal sentencing that the Commission was directed to meet, see *Neal* v. *United States*, 116 S. Ct. 763, 767 (1996), Congress gave the Commission a variety of specific requirements with which it was to comply. 28 U.S.C. 994(b)-(n). Among those requirements is the following provision, dealing with career offenders convicted of crimes of violence or drug trafficking crimes:

> The [Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [(1) has been convicted of a felony that is a crime of violence or a drug trafficking crime, and (2) has two prior felony convictions involving crimes of violence or drug trafficking crimes].

28 U.S.C. 994(h).

The Sentencing Commission implemented Section 994(h) in Section 4B1.1 of the Sentencing Guidelines, entitled "Career Offender," which provides as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

> * If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Before November 1, 1994, the commentary to that Guideline defined the phrasé "offense statutory maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction." Neither the

Guideline itself nor any accompanying commentary specified the manner in which the "offense statutory maximum" was to be determined when federal law specified a basic statutory maximum for all persons convicted of a particular offense, but an enhanced statutory maximum for persons convicted of that offense who also had prior convictions. Such enhanced sentences are a critical component of sentencing for federal narcotics crimes.[1] The courts of appeals that had addressed the question, however, uniformly concluded that the "offense statutory maximum" for a defendant with prior convictions was the enhanced maximum penalty, not the maximum penalty authorized for a defendant with no prior convictions. See *United States* v. *Smith*, 984 F.2d 1084, 1086-1087 (10th Cir.), cert. denied, 114 S. Ct. 204 (1993); *United States* v. *Saunders*, 973 F.2d 1354, 1364 (7th Cir. 1992), cert. denied, 506 U.S. 1070 (1993); *United States* v. *Gar- rett*, 959 F.2d 1005, 1009-1011 (D.C. Cir. 1992); *United States* v. *Amis*, 926 F.2d 328, 330 (3d Cir. 1991); *United States* v. *Sanchez-Lopez*, 879 F.2d 541, 558-560 (9th Cir. 1989).

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[1] For example, 21 U.S.C. 841(b)(1)(C) states that persons convicted of specified controlled substance offenses "shall be sentenced to a term of imprisonment of not more than 20 years." Section 841(b)(1)(C) further provides, however, that, "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years." The enhanced penalties may be imposed only if "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a)(1).

By Amendment 506, effective November 1, 1994, the Sentencing Commission amended the commentary to Guidelines § 4B1.1 to define the phrase "offense statutory maximum." The Commission defined that phrase to mean "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." See App. 116a. The Commission asserted that by precluding use of the enhanced statutory maximums, Amendment 506 "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). It also stated that "the enhanced maximum sentences provided for recidivist drug offenders * * * did not exist" at the time that 28 U.S.C. 994(h) was enacted. 59 Fed. Reg. at 23,609. Pursuant to its authority under 28 U.S.C. 994(u), the Commission made Amendment 506 retroactive, so that a sentencing court would have discretion to reduce a sentence imposed before the promulgation of the amendment.[2] See Guidelines § 1B1.10(c) (Nov. 1, 1995).

2. The court of appeals' decision involves consolidated appeals from four cases in which defendants moved for reductions of their sentences based on the amendment. All four defendants had been sentenced

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[2] The Department of Justice opposed the proposed amendment before the Commission, and, following its promulgation, determined that federal prosecutors should oppose the application of the amendment by sentencing courts on the ground that it is invalid as inconsistent with 28 U.S.C. 994(h).

before the effective date of Amendment 506. In each case the district court had utilized the enhanced statutory maximum penalty in calculating the defendant's total offense level under Guidelines § 4B1.1 (Nov. 1, 1993). Each of the defendants subsequently moved for resentencing based on Amendment 506. The government argued that Amendment 506 is invalid as contrary to Section 994(h). In two of the cases, the district court concluded that Amendment 506 is a valid exercise of the Commission's authority; the court reduced one defendant's sentence but declined to reduce that of the other defendant. In the other two cases, the district court determined that Amendment 506 is inconsistent with 28 U.S.C. 994(h) and thus invalid, and it therefore denied the defendants' motions for resentencing.

George LaBonte: After a plea of guilty, respondent LaBonte was convicted on one count of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). At LaBonte's sentencing, the district court found that LaBonte qualified as a career offender. Based on LaBonte's prior drug convictions, the district court determined that his "offense statutory maximum" was more than 25 years' imprisonment and set his offense level at 34. After a three-level reduction for acceptance of responsibility, LaBonte had an offense level of 31 and a sentencing range of 188-235 months' imprisonment. The district court imposed a sentence of 188 months' imprisonment. The court of appeals affirmed. *United States* v. *LaBonte*, 19 F.3d 1427 (1st Cir. 1994) (Table); see App. 7a.

After the effective date of Amendment 506, LaBonte moved for resentencing under 18 U.S.C. 3582(c)(2).[3] The district court found that the amendment is valid and granted LaBonte's motion. See App. 54a-66a. Using the definition of "offense statutory maximum" required by Amendment 506, the court found that LaBonte's total offense level was 32. See *id.* at 7a-8a. The court again deducted three levels for acceptance of responsibility. See *id.* at 8a. Application of Amendment 506 resulted in a sentencing range of 151 to 188 months' imprisonment. *Ibid.*; *id.* at 57a. The district court imposed a sentence of 151 months' imprisonment. *Id.* at 66a.

David E. Piper: After a plea of guilty, Piper was convicted of conspiracy to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846, and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). The district court employed the enhanced statutory maximum and determined that Piper's offense level was 37. The court reduced that level by three based on Piper's acceptance of responsibility and calculated Piper's sentencing range as 262 to 327 months' imprisonment. Piper received a sentence of

[3] That section states that a sentencing "court may not modify a term of imprisonment once it has been imposed except that— * * * (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant * * * the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) [of Title 18] to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2).

300 months' imprisonment. The court of appeals affirmed. 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995); see App. 8a.

Piper later sought resentencing under Amendment 506, arguing that, if the unenhanced statutory maximum were used, his sentencing range would be 210 to 262 months' imprisonment. See App. 8a & n.3. The district court assumed that the amendment is valid, but declined to give Piper its benefit. *Id.* at 8a, 102a. The court found that application of the amendment was discretionary, and it concluded that the amendment should not apply in Piper's case because of the seriousness of his offense. *Ibid.*

Alfred Lawrence Hunnewell: After a plea of guilty, Hunnewell was convicted on two counts of possessing controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Using the enhanced statutory maximum, the district court set Hunnewell's offense level at 34, deducted three levels for acceptance of responsibility, and found that Hunnewell's sentencing range was 188 to 235 months' imprisonment. The court sentenced Hunnewell to 188 months' imprisonment. The court of appeals affirmed. 10 F.3d 805 (1st Cir. 1993) (Table), cert. denied, 114 S. Ct. 1616 (1994); see App., *infra*, 8a-9a.

After November 1, 1994, Hunnewell moved for a reduction in sentence. He asserted that application of Amendment 506 to the Guidelines would lower his sentencing range to 151 to 188 months' imprisonment. See App. 9a n.4. The district court found that Amendment 506 is invalid because it is "in contravention of 21 U.S.C. § 841(b)(1)(C) and 28 U.S.C. § 994(h)." *Id.* at 71a. Accordingly, the court denied the motion for resentencing. *Ibid.*

Stephen Dyer: After a plea of guilty, Dyer was convicted of conspiracy to possess controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Using the enhanced statutory maximum, the district court set Dyer's total offense level at 34 and refused to reduce that level based on acceptance of responsibility, resulting in a sentencing range of 262 to 327 months' imprisonment. The court imposed a sentence of 262 months' imprisonment. The court of appeals affirmed. 9 F.3d 1 (1st Cir. 1993) (per curiam); see App. 9a.

After November 1, 1994, Dyer filed a petition under 28 U.S.C. 2255, seeking to have his conviction set aside. App. 9a. In the alternative, Dyer asked to be resentenced based on Amendment 506. *Ibid.* Amendment 506, if applied, would have reduced Dyer's Guidelines sentencing range to 210-262 months' imprisonment. *Id.* at 10a n.5. The district court denied the petition, rejecting Dyer's reliance on Amendment 506 on the basis of its prior decision on Hunnewell's request for resentencing. *Id.* at 70a.

3. The government appealed the district court's order granting LaBonte's motion for resentencing. Piper, Hunnewell, and Dyer appealed the district court orders denying their motions. The court of appeals consolidated the cases, and a divided panel held that Amendment 506 is valid. App. 1a-53a.

The court of appeals first determined that the standard of review articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides "the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute." App. 11a. The court "f[ou]nd no clear congressional directive regarding

the meaning of the term 'maximum' as that term is used in [28 U.S.C.] 994(h)." *Id.* at 19a. It therefore asked whether the Commission's interpretation of the statute was a reasonable one.

The court concluded that it was. The court explained:

> The statute explicitly refers to "categories of defendants," namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests. Unless one is prepared to write off Congress's choice of the word "categories" as some sort of linguistic accident or awkward locution—and we are not so inclined—this approach is eminently supportable.

App. 19a. The court noted that "[t]he root purpose of the Career Offender Guideline, U.S.S.G. § 4B1.1, is to enhance repeat offenders' sentences," *id.* at 23a, and determined that "[t]he revamped guideline not only accomplishes that purpose but also coheres with Congress's discernible aims in making enhanced penalties available under [21 U.S.C.] 841," *id.* at 23a-24a.

The court of appeals then considered the application of Amendment 506 to the four defendants before it. The court affirmed the district court's judgment reducing respondent LaBonte's sentence based on Amendment 506. App. 30a. The court also affirmed the judgment with respect to Piper. *Id.* at 30a-32a. The court rejected Piper's contention that

the district court was required to resentence him in accordance with Amendment 506, explaining that the pertinent statutory provision (18 U.S.C. 3582(c)(2)) "authorize[d] the district judge to resentence when resentencing is consistent with the policies underlying [Amendment 506], but it neither compel[led] the judge to do so nor limit[ed] his inquiry to the consistency question." App. 30a. With respect to respondents Hunnewell and Dyer, the court of appeals set aside the district court's orders denying the motions for resentencing and remanded the cases so as to permit the district court to consider whether the respondents should be resentenced in accordance with Amendment 506. *Id.* at 32a-34a. The court also affirmed the district court's dismissal of Dyer's Section 2255 petition. App. 34a-37a.

Judge Stahl filed an opinion concurring in part and dissenting in part.[4] Judge Stahl concluded that Amendment 506's approach to the implementation of 28 U.S.C. 994(h) was

> inherently implausible because it effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841. These statutes, to which Congress expressly referred in the text of § 994(h), provide an intricate web of enhanced penalties applicable to defendants who are repeat offenders or whose offenses resulted in death or serious bodily injury. The [Commission's] interpretation, however, completely disregards these enhanced penalties because, under that interpretation, all defendants must be sentenced at or near the unenhanced maximum whether or not the enhanced penalties apply. Recognizing that Congress specifically referred to these statutes in the text of § 994(h), it seems absurd to suppose that Congress did not intend to preclude this result.

App. 40a. Judge Stahl also argued that "the legislative history strongly suggests that Congress intended 'maximum term authorized' [in 28 U.S.C. 994(h)] to refer, in appropriate circumstances, to the enhanced maximum penalty." *Id.* at 42a.

The government filed a petition for rehearing with suggestion for rehearing en banc. The court of appeals denied rehearing and rehearing en banc, with Judges Stahl and Lynch dissenting. App. 109a-113a. Judge Stahl's dissent noted, *inter alia*, that, "because the amendment applies retroactively, it will undoubtedly burden district courts throughout the country with the task of reviewing on a case by case basis a substantial number of requests for resentencing. Indeed, this is already the case in the First Circuit." *Id.* at 112a. Judge Boudin concurred in the denial of rehearing en banc but expressed the view that "[t]he sooner the Supreme Court has an opportunity to consider whether to review this case, the better for all concerned." *Id.* at 111a.

[4] Judge Stahl concurred in the court of appeals' dismissal of respondent Dyer's Section 2255 petition and dissented from the court's determination that Amendment 506 was valid. See App. 38a.

REASONS FOR GRANTING THE PETITION

The court of appeals has upheld an amendment to the Sentencing Guidelines that, contrary to a specific congressional requirement, provides for a reduced sentencing range for some of the most serious offenders in the federal system. Rather than meeting Congress' direction that such career offenders be

sentenced "at or near" their statutory maximum terms—terms that are enhanced by statute to reflect their status as recidivists—the Commission has authorized a regime in which such defendants are sentenced based on maximum terms that would apply if they were *not* recidivists.

The First Circuit's decision in this case squarely conflicts with decisions of the Seventh and Tenth Circuits. As those courts have recognized, Amendment 506 is inconsistent with the directive of 28 U.S.C. 994(h) that the Sentencing Guidelines shall "specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders, and the Amendment is therefore invalid. The Ninth Circuit has deepened the split by joining the First Circuit in concluding that Amendment 506 is a permissible exercise of the Commission's authority. Review by this Court is warranted to resolve the conflict among the circuits on an issue of widespread importance in federal sentencing.

1. The First Circuit in the instant case was the first court of appeals to address the validity of Amendment 506. Since its decision, unanimous panels of the Seventh and Tenth Circuits have rejected the First Circuit's conclusion and have determined that Amendment 506 conflicts with the Sentencing Reform Act and is invalid. The circuit conflict was recently compounded by the Ninth Circuit's decision upholding Amendment 506.

A. In *United States* v. *Hernandez*, Nos. 95-1143 & 95-1212, 1996 WL 116360 (Mar. 18, 1996), the Seventh Circuit held that Amendment 506 could not be reconciled with 28 U.S.C. 994(h) and is therefore invalid. The court concluded that "to construe [Section 994(h)] as referring to the unenhanced maximum departs from the common sense of the term 'maximum,' rests on a strained reading of the term 'categories,' and relegates the enhanced penalties Congress provided for in [21 U.S.C.] 841 to the dust bin." Slip op. 23, 1996 WL 116360 at *12. The court explained that

> perhaps the most compelling indication that the Commission's interpretation is inconsistent with congressional intent lies in the fact that it virtually nullifies the enhancements called for in [21 U.S.C.] 841. If one uses the unenhanced statutory maximum as the term of incarceration to be referenced for all defendants under the Career Offender Guideline, nearly all sentences will fall at or below that lower maximum term. Thus, absent an extraordinary number of upward adjustments in the offense level or an outright departure from the guideline range, no defendant will be sentenced to a term at or near the enhanced maximum.

Id. at 28, 1996 WL 116360, at *15. In the Seventh Circuit's view, "[w]hen Congress directed the Sentencing Commission to provide for sentences 'at or near the maximum term authorized' for persons who qualify as career offenders, it meant the highest penalty for which a given defendant is eligible." *Id.* at 31, 1996 WL 116360, at *16. The Seventh Circuit acknowledged that its ruling conflicts with the First Circuit's decision in the instant cases but found the

First Circuit's reasoning unpersuasive. See *id.* at 23-26, 1996 WL 116360, at *12-14.[5]

B. The Tenth Circuit reached the same conclusion in *United States* v. *Novey*, No. 95-6249 (Mar. 15, 1996) (to be reported at 78 F.3d 1483). The court found itself "compelled by the clear directive of § 994(h) to hold that Amendment 506 is inconsistent with that statute, and is therefore invalid as beyond the scope of the Commission's authority delegated to it by Congress." Slip op. 7. In the court's view, "[i]t would make no sense for the statute to require the 'maximum term authorized' to be considered in the context of defendants with two or more prior qualifying felony convictions unless it was intended that that phrase mean the enhanced sentence resulting from such a pattern of recidivism." *Id.* at 9. Like the Seventh Circuit, the Tenth Circuit recognized that its holding conflicts with the decision of the First Circuit in the instant cases but disagreed with the First Circuit's reasoning. *Id.* at 12-18. Rather, the court agreed with Judge Stahl's dissenting view that "the Commission's current interpretation of the statute is 'inherently implausible because it effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841.'" *Id.* at 10 (quoting App. 40a).

C. In *United States* v. *Dunn*, No. 95-30172, 1996 WL 162434 (Apr. 9, 1996), a divided panel of the Ninth Circuit upheld Amendment 506 as consistent with 28

[5] Because its decision conflicted with that of the First Circuit, the Seventh Circuit opinion was circulated among all active circuit judges pursuant to Seventh Circuit Rule 40(e). Only Judges Easterbrook and Ripple voted in favor of rehearing en banc. Slip op. 2 n.**, 1996 WL 116360, at *19.

U.S.C. 994(h). The court relied in substantial measure on the decision in the instant cases, explaining that it found the opinion of the First Circuit majority to be more persuasive than the views expressed by Judge Stahl in dissent. 1996 WL 162434, at *2. Judge Rymer dissented "for the reasons stated by Judge Stahl in his dissenting opinion in" the instant cases. *Id.* at *3.

2. Review by this Court is warranted to resolve the square conflict among the circuits. The question presented is pending in several other courts of appeals and in dozens of district courts. The ultimate resolution of the issue will have a significant effect on the periods of incarceration for the country's most serious drug offenders. And in light of the careful and detailed exposition of the competing positions in the majority and dissenting opinions of the First, Seventh, Ninth, and Tenth Circuits, the issue is ripe for consideration by this Court.

3. As the Seventh and Tenth Circuits have recognized, Amendment 506 cannot be reconciled with the Commission's statutory obligation to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders. 28 U.S.C. 994(h). Section 994(h)'s reference to "the maximum term authorized" clearly refers to the actual statutory maximum for the defendants subject to its provisions — *i.e.*, the enhanced maximum for defendants with prior convictions for the specified felonies—rather than to the maximum penalty applicable to hypothetical defendants who have no previous convictions. Congress's evident intention in enacting Section 994(h) was to ensure that whatever provision the Commission made in the Guidelines for defendants

who did not have prior criminal records at the time they committed a drug trafficking crime, defendants who *did* have two prior convictions for the specified crimes would be sentenced at or near the top of the enhanced imprisonment ranges that Congress had provided for such repeat offenders. Under Amendment 506, however, defendants who are required by virtue of their recidivist status to be sentenced "at or near" the statutory maximum will be sentenced "at or near" a maximum calculated as if they were not recidivists. As the Seventh Circuit recognized, that approach "virtually nullifies the enhancements called for by [21 U.S.C.] 841" by establishing a regime under which, "absent an extraordinary number of upward adjustments in the offense level or an outright departure from the guideline range, no defendant will be sentenced to a term at or near the enhanced maximum." *Hernandez*, slip op. 28, 1996 WL 116360, at *15.

4. The Commission's stated justifications for Amendment 506 do not withstand analysis. The Commission explained that, in its view, the amendment "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). Neither of those justifications is persuasive.

The Commission's allusion to "unwarranted double counting" is enigmatic. The reference may reflect the Commission's view that it is unfair for prior convictions to be used both to trigger the statutory enhancement and to increase the defendant's total offense level under the Career Offender Guideline. See *Hernandez*, slip op. 32, 1996 WL 116360, at *17

("The notion that use of the enhanced maximum amounts to double counting * * * stems from the fact that the defendant's prior convictions trigger both the statutory enhancement and the Career Offender Guideline."). Alternatively, the perceived "double counting" may be the use of the defendant's prior convictions both in determining the total offense level and in computing the criminal history category. See *Novey*, slip op. 6, 1996 WL 115326, at *2 ("Under [the government's] interpretation [of Guidelines § 4B1.1], a defendant's prior convictions are, in effect, used twice: first to enhance the defendant's criminal history category and again to enhance the defendant's offense level.").[6]

Neither of the possible "double counting" objections has merit. As to the first objection: Section 994(h)'s directive that the Guidelines sentencing range for a career offender must be "at or near" the statutory maximum necessarily requires that increases in the statutory maximum will be translated by some mechanism into increases in the applicable sentencing range. Calling that mechanism "double counting" does not undercut the fact that it is simply

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[6] Even under Amendment 506, however, that form of "double counting" would still be present, albeit to a reduced extent. Guidelines § 4B1.1 provides that in determining the guideline range for a career offender, "[i]f the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply." See page 4, *supra*. Because the table becomes applicable only if a defendant is a career offender (*i.e.*, only if he has at least two prior felony convictions of the specified type), the Guideline thus expressly uses a defendant's prior convictions in increasing his offense level, as well as in determining his criminal history category.

a way to elevate the sentencing range in order to achieve compliance with the statutory mandate. As to the second: while use of prior convictions in computing both the offense level and the criminal history category might be objectionable if the sentence ultimately arrived at appeared inconsistent with congressional intent, here the reverse is true.

Nor does using the enhanced statutory maximum give undue effect to prosecutorial discretion. Pursuant to 21 U.S.C. 851(a)(1), the enhanced statutory maximum penalties apply only if the government has given the defendant pretrial notice of the prior convictions on which the government intends to rely. See note 1, *supra*. Thus, as a practical matter, federal prosecutors have discretion to determine (by filing or declining to file the requisite notice) whether an enhanced statutory maximum term of imprisonment will apply. Insofar as Amendment 506 might be said to prevent "disparity associated with variations in the exercise of prosecutorial discretion," it does so by effectively precluding the government from invoking the enhanced statutory maxima at all. That rationale for Amendment 506 is clearly inconsistent with the statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1996

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA

v.

GEORGE LABONTE, DAVID E. PIPER,
ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1538

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE LABONTE, DEFENDANT, APPELLEE

No. 95-1226

UNITED STATES OF AMERICA, APPELLEE

v.

DAVID E. PIPER, DEFENDANT, APPELLANT

No. 95-1101

UNITED STATES OF AMERICA, APPELLEE

v.

ALFRED LAWRENCE HUNNEWELL, DEFENDANT, APPELLANT

No. 95-1264

STEPHEN DYER, PETITIONER, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT, APPELLEE

Heard Aug. 2, 1995

Decided Dec. 6, 1995

Before: SELYA, CYR and STAHL, Circuit Judges.

SELYA, Circuit Judge.

After many years of study and debate, Congress passed the Sentencing Reform Act of 1984, Pub.L. 98-473, tit. II, § 212(a), 98 Stat. 1837 (1984) (codified as amended at scattered sections of 18 & 28 U.S.C.). The legislation took effect on November 1, 1987, and caused dramatic changes both in the methodology of criminal sentencing and in the outcomes produced. These changes did not go unremarked: sentencing appeals, once rare in federal criminal cases, became commonplace. Predictably, the tidal wave of appeals loosed a flood of judicial opinions distilling the meaning, scope, and application of a seemingly boundless sea of guidelines, policy statements, notes, and commentary. And whenever it appeared that the flood waters might recede, the Sentencing Commission launched a fresh deluge of revisions that required the courts to paddle even faster in a Sisyphean effort to stay afloat.

These four consolidated appeals are emblematic of the difficulties that courts face in dealing with the new sentencing regime. All four appeals implicate Application Note 2 to the Career Offender Guideline, as modified by Amendment 506, United States Sentencing Commission, *Guidelines Manual* § 4B1.1, comment. (n. 2) (Nov. 1994). No appellate court has addressed the validity of Amendment 506, and, in the quartet of criminal cases underlying these appeals, two able district judges reached diametrically opposite conclusions. Although the call is close, we hold that Amendment 506 is a reasonable implementation of the statutory mandate, 28 U.S.C. § 994(h) (1988 & Supp. V 1993), and is therefore valid. Thus, after

answering other case-specific questions raised by the various parties, we affirm the judgments in the *LaBonte* and *Piper* cases; vacate the judgment in the *Hunnewell* case and remand for reconsideration of the appropriateness of resentencing; affirm the judgment in the *Dyer* case in respect to all non-sentence-related matters and vacate the sentence-related aspect of that judgment, remanding for reconsideration.

I. THE AMENDMENT

Congress created the Sentencing Commission in 1984 to design and implement federal sentencing guidelines. Three principal forces propelled the legislation: Congress sought to establish truth in sentencing by eliminating parole, to guarantee uniformity in sentencing for similarly situated defendants, and to ensure that the punishment fit the crime. *See* U.S.S.G. ch. 1, pt. A(3), & 2; *see also United States* v. *Unger*, 915 F.2d 759, 762-63 (1st Cir.1990) (explaining that the primary purposes of the Sentencing Reform Act are to provide certainty, uniformity, and fairness in sentencing), *cert. denied*, 498 U.S. 1104, 111 S.Ct. 1005, 112 L.Ed.2d 1088 (1991). In addition to general guidance, *see, e.g.*, 28 U.S.C. § 991(b), Congress also gave the Commission some specific marching orders.

One such set of marching orders is conveyed by 28 U.S.C. § 994(h), which provides in part:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [has been convicted of a

violent crime or felony drug offense and has at least two such prior convictions].

The Commission implemented section 994(h) through the Career Offender Guideline. *See* U.S.S.G. § 4B1.1, comment. (backg'd). This guideline sets forth a table of enhanced total offense levels (TOLs)—said to be a function of the "Offense Statutory Maximum"—to be employed in calculating the sentences of so-called "career offenders." See U.S.S.G. § 4B1.1. A defendant is regarded as a career offender if he was at least eighteen years old at the time of the offense of conviction, that offense is a crime of violence or a drug-related felony, and he has two prior convictions for drug felonies or crimes of violence. *See id.*; *see also United States v. Piper*, 35 F.3d 611, 613 n. 1 (1st Cir.1994), cert. denied, — U.S. ——, 115 S.Ct. 1118, 130 L.Ed.2d 1082 (1995).

When the Commission issued the Career Offender Guideline, it coined the phrase "Offense Statutory Maximum," but did not define the phrase beyond saying that "the term 'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction." U.S.S.G. § 4B1.1, comment. (n. 2) (Nov. 1987). Since this definition was tautological, it proved unilluminating. Faced with a need to improvise, several courts of appeals concluded that the phrase encompassed not merely the statutory maximum applicable to the offense of conviction *simpliciter*, but also the upgraded statutory maximum that results after available enhancements for prior criminal activity are taken into account. *See United States v. Smith*, 984 F.2d 1084, 1085 (10th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C.Cir.1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir.1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir.1989). This lexicographical choice carried with it important consequences; under the courts' construction, a defendant whose maximum possible term of imprisonment for a crime of violence or drug offense was enhanced from, say, twenty to thirty years on account of prior criminal activity, netted two additional offense levels (increasing his TOL from thirty-two to thirty-four) and found himself in a steeper sentencing range.

In Amendment 506, the Commission first meaningfully defined the phrase "Offense Statutory Maximum." The amendment provides that the phrase, for the purpose of the Career Offender Guideline, "refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." U.S.S.G. § 4B1.1, comment. (n. 2) (Nov. 1994). The amended note offers the example of a defendant who is subject to a sentencing enhancement under 21 U.S.C. § 841(b)(1)(C), in which case "the 'Offense Statutory Maximum' for the purposes of this guideline is twenty years and not thirty years." Finally, the Commission opted to give Amendment 506 retroactive effect. See U.S.S.G. § 1B1.10(c) (Nov. 1994).

Initially, the Commission attempted to justify the amendment as "avoid[ing] unwarranted double-counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on

prior convictions." U.S.S.G., App. C, Amend. 506, at 409 (Nov. 1994). In addition, the Commission observed that Congress enacted the array of sentence-enhancing laws after the statutory predicate for the Career Offender Guideline had become law. *See id.* Subsequently, the Commission attempted to explain its newly emergent interpretation of the Career Offender Guideline in terms of a desire to avoid unwarranted disparity and to achieve consistency. *See* Amendment Notice, 60 Fed.Reg. 14,054, 14,055 (1995); *see also United States v. LaBonte*, 885 F.Supp. 19, 23 n. 4 (D.Me.1995). Whatever may be its provenance, it is nose-on-the-face plain that, in many instances, Amendment 506 produces lower TOLs (and, ultimately, shorter sentences) than the unembellished Career Offender Guideline (as interpreted by the courts). Due to this palliative effect, critics view it as inimical to congressional intent.[1]

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[1] As we have said before, "irony is no stranger to the law." *Amanullah v. Nelson*, 811 F.2d 1, 18 (1st Cir.1987). Throughout its history, the Sentencing Commission has been berated for the severity of the sentencing outcomes dictated by the guidelines. *See, e.g., United States v. Jackson*, 30 F.3d 199, 204-06 (1st Cir.1994) (Pettine, J., concurring) (criticizing the guidelines for fostering excessively harsh sentences); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines and Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1690 (1992) ("The new sentencing guidelines are more complex, inflexible, and severe than those devised by any other jurisdiction."); Charles J. Ogletree, Jr., *Commentary: The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv.L.Rev. 1938, 1939 (1988) (criticizing the "unreasonably long sentences" produced by the guidelines).

II. THE DEFENDANTS

These four defendants all were sentenced in the District of Maine as career offenders prior to the birth of Amendment 506. In each instance, the prosecution filed a notice under 21 U.S.C. § 851(a)(1) signalling its intention to seek enhanced penalties for prior convictions, and the sentencing court arrived at the defendant's "Offense Statutory Maximum" by factoring the statutory enhancement into the mix. The court then set each defendant's TOL and guideline sentencing range (GSR) accordingly. Following the promulgation of the amendment, all four defendants tried to avail themselves of it. We limn their individual circumstances.

A. GEORGE LABONTE.

A grand jury indicted LaBonte for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C). After he pleaded guilty, the district court (Hornby, U.S.D.J.) sentenced him under the Career Offender Guideline. Using an enhanced statutory maximum derived from LaBonte's record of prior drug convictions, Judge Hornby set LaBonte's TOL at thirty-four, granted a three-level downward adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, arrived at a GSR of 188-235 months, and sentenced him to serve 188 months. We affirmed. *See United States v. Labonte*, 19 F.3d 1427, 1994 WL 107868 (1st Cir.1994) (table).

Subsequent to the promulgation of Amendment 506, LaBonte moved for resentencing. Judge Hornby determined that Amendment 506 was valid and decided to apply it. *See LaBonte*, 885 F.Supp. at 24. He granted LaBonte's motion, focused on the unenhanced statutory maximum to calculate a new TOL

(thirty-two), and again deducted three levels for acceptance of responsibility. This recomputation yielded a GSR of 151-188 months, and Judge Hornby lowered LaBonte's sentence to the nadir of the new range. *See id.* The government appeals from this disposition.

B. DAVID E. PIPER.

Piper pleaded guilty to a two-count information charging conspiracy to possess marijuana with intent to distribute and use of a firearm in connection with a drug offense. *See* 21 U.S.C. §§ 841(a)(1) & (b)(1)(B), 846; 18 U.S.C. § 924(c)(1). Utilizing an enhanced statutory maximum, Judge Hornby set Piper's TOL at thirty-seven, subtracted three levels for acceptance of responsibility, arrived at a GSR of 262-327 months, and imposed an incarcerative sentence of 300 months.[2] We affirmed. *See Piper*, 35 F.3d at 613.

Hot on the heels of Amendment 506, Piper moved unsuccessfully for resentencing. Although Judge Hornby assumed the amendment's validity, he exercised his discretion and declined to permit Piper to benefit from it.[3] Piper appeals from this disposition.

C. ALFRED LAWRENCE HUNNEWELL.

A grand jury indicted Hunnewell on six narcotics counts. See 21 U.S.C. § 841(a)(1). He thereafter pleaded guilty to two counts of possessing controlled substances with intent to distribute, and the court (Carter, U.S.D.J.) dismissed the remaining counts.

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[2] Piper received an additional five-year sentence on the firearms count. That impost is not in issue here.

[3] The amendment, if applied, would have lowered Piper's adjusted offense level from thirty-four to thirty-two, and decreased the GSR to 210- 262 months.

Using an enhanced statutory maximum, Judge Carter set Hunnewell's TOL at thirty-four, deducted three levels for acceptance of responsibility, arrived at a GSR of 188-235 months, and sentenced the defendant to serve 188 months. We affirmed. *See United States v. Hunnewell*, 10 F.3d 805, 1993 WL 483252 (1st Cir.1993) (table), *cert. denied*, — U.S. ——, 114 S.Ct. 1616, 128 L.Ed.2d 343 (1994).

After the promulgation of Amendment 506, Hunnewell beseeched the district court to trim his sentence. Judge Carter denied this motion, concluding that the Sentencing Commission lacked the authority to adopt Amendment 506.[4] Hunnewell appeals.

D. STEPHEN DYER.

Dyer pleaded guilty to a charge of conspiring to possess controlled substances with intent to distribute in contravention of 21 U.S.C. §§ 841(a)(1), 846. Consulting the enhanced statutory maximum, Judge Carter set Dyer's TOL at thirty-four, refused an acceptance-of-responsibility discount, arrived at a GSR of 262-327 months, and levied a 262-month term of imprisonment. We affirmed. *See United States v. Dyer*, 9 F.3d 1 (1st Cir.1993) (per curiam).

Dyer eventually filed a petition for habeas relief, see 28 U.S.C. § 2255, in which he sought to set aside his conviction or, in the alternative, to reduce his sentence by virtue of Amendment 506. Judge Carter denied and dismissed the habeas petition. Among other things, the judge, declaring Amendment 506 to

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[4] The amendment, if applied, would have lowered Hunnewell's adjusted offense level from thirty-one to twenty-nine, and decreased his GSR to 151-188 months.

be unlawful, refused to resentence Dyer.[5] Dyer protests all aspects of the district court's order.

III. THE VALIDITY OF AMENDMENT 506

We begin our analysis by discussing, generally, the methodology we will employ in examining Amendment 506. We then proceed to tackle the two conundrums that are inextricably intertwined with the question of the amendment's validity.

A. THE METHODOLOGY.

Commentary authored by the Sentencing Commission that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, ——, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993). Like the Commission's policy statements, its commentary is binding on the federal courts. *See id.* at —— - ——, 113 S.Ct. at 1917-18. In general, these interpretive materials are entitled to the same substantial degree of deference that courts routinely accord an administrative agency's interpretation of its own legislative rules. *See id.* at ——, 113 S.Ct. at 1919. Thus, under *Stinson*, judicial scrutiny of the Commission's commentary is limited to ensuring consistency with federal statutes (including, but not restricted to, the Commission's enabling statute), and with the guidelines themselves.

These two lines of inquiry proceed along different analytic paths. When a court ventures to determine whether the Commission's commentary tracks the

[5] Amendment 506, if applied, would have lowered Dyer's adjusted offense level from thirty-four to thirty-two, and decreased his GSR to 210-262 months.

guidelines, the degree of deference is at its zenith. In this context, commentary is not merely the end product of delegated authority for rulemaking, but, rather, "explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice." *Id.* at ——, 113 S.Ct. at 1918. Unless the commentary is a palpably erroneous rendition of a guideline, it merits respect. *See id.* at ——, 113 S.Ct. at 1919; Piper, 35 F.3d at 617.

The determination of whether the guidelines are consistent with positive statutory law touches a more vulnerable spot. That inquiry implicates the traditional process of reviewing agency rules typified by the Supreme Court's watershed opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, while the Court has warned that *Chevron* does not provide an apt analogy for the process of reviewing the relationship between commentary, on the one hand, and guidelines, on the other hand, *see Stinson*, 508 U.S. at ——, 113 S.Ct. at 1918, we believe that *Chevron* deference is the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute. The *Chevron* two-step approach fits that type of inquiry like a glove.[6] *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781-82 (describing two-step test).

[6] We note in passing the suggestion by some scholars that *Stinson* implies an extraordinarily deferential standard of review for the entire process of evaluating guideline commentary. On this view, commentary should be honored unless it constitutes a plainly erroneous interpretation either of a guideline or of a statute. *See* 1 Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.10, at

Applying this methodology here is not without complications. We limit our inquiry to the fit (or lack of fit) between the Career Offender Guideline as explicated in Amendment 506 and the applicable statute, 28 U.S.C. § 994(h).[7] In that statute, Congress directed the Commission to ensure that certain recidivists receive sentences "at or near the maximum." The Career Offender Guideline represents the Commission's response to this directive. *See* U.S.S.G. § 4B1.1, comment. (backg'd). Because the Commission's understanding of its statutory mandate must be measured against the *Chevron* benchmark, the inquiry follows a familiar format:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the . . . question for the court is whether the agency's answer is based on a permissible construction of the statute.

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284 (3d ed. 1994). We need not probe this possibility today. Because Amendment 506 passes muster under the *Chevron* test, it would clearly pass muster if we were to employ the more deferential test suggested by Professors Davis and Pierce.

[7] Because the government does not contend that Amendment 506 is inconsistent with the guideline itself, we eschew any discussion of that point. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) (explaining that issues not briefed and argued are deemed abandoned), *cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

Chevron, 467 U.S. at 842-43, 104 S.Ct. at 2781-82; *accord Strickland v. Commissioner, Me. Dep't of Human Servs.*, 48 F.3d 12, 16 (1st Cir.), *cert. denied*, — U.S. ——, 116 S.Ct. 145, 133 L.Ed.2d 91 (1995).

These appeals focus on a single sentence that appears in 28 U.S.C. § 994(h), a sentence that requires the Commission to adopt guidelines "that specify a sentence to a term of imprisonment at or near the maximum term authorized for [certain] categories of defendants." This problematic sentence presents three issues of statutory interpretation, necessitating two distinct iterations of the *Chevron* standard. The first application combines two issues; it concerns the explication of the word "maximum" as that word is used in section 994(h) and, concomitantly, the meaning of the word "categories" as used therein. The second occasion for *Chevron* analysis involves an exegesis of the phrase "at or near" as used in the same sentence. The two problems are interrelated, but they are somewhat different in nature.[8]

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[8] Although we are mindful that plausible if strained interpretations of a series of individual statutory terms might at times lead to an impermissible overall interpretation of a statute, that is not the case here. Whether one conducts the ensuing analysis in one segment or two, the result is unaffected; the simple fact of the matter is that the Commission has developed a reasonable interpretation of the vague and ambiguous language of section 994(h). That said, we employ a piecemeal approach here, as we believe it better illustrates that U.S.S.G. § 4B1.1, as interpreted by the amended commentary, is a permissible construction of Congress's directive that career offenders be sentenced "at or near the maximum term authorized."

B. THE FIRST CONUNDRUM.

In the context of section 994(h), the term "maximum" is susceptible of divergent meanings, depending, in part, on precisely what constitutes a "categor[y] of defendants." One possible reading is that "categories" are composed of those defendants charged with violations of similar statutes against whom prosecutors have filed notices of intention to seek sentence enhancements (e.g., all repeat offender drug traffickers against whom the government has filed sentence-enhancing informations under 21 U.S.C. § 851(a)(1)). On this view, the relevant statutory maximum for any such defendant would be the enhanced statutory maximum (ESM) applicable to repeat offenders. *See* 21 U.S.C. §§ 841(b)(1), 851(a)(1). But this reading is not linguistically compelled. The word "categories" plausibly can be defined more broadly to include all offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant (e.g., all drug traffickers, or all repeat offender drug traffickers, who are charged with violating 21 U.S.C. § 841(a)(1)). On this view, the word "maximum" refers to the unenhanced statutory maximum (USM), see 21 U.S.C. § 841(b)(1), since this represents the highest possible sentence applicable to all defendants in the category.[9]

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[9] The relevance of this somewhat arid discussion will become more apparent in Part III(C), infra, when the need arises to determine the extent to which sentences are "at or near the maximum."

Since the sentencing guidelines must comport with such specific statutory directives as Congress has ordained, *see United States v. Saccoccia*, 58 F.3d 754, 786 (1st Cir.1995) ("It is apodictic that the sentencing guidelines cannot sweep more broadly than Congress' grant of power to the Sentencing Commission permits."), the question becomes whether Congress clearly intended to prefer one of these interpretations over the other. The issue is not free from doubt. Several courts of appeals have heretofore read the word "maximum" in the former fashion (as referring to the ESM), *see supra* pp. 1400-01 [4a-5a], whereas the Sentencing Commission now reads the word in the latter sense (as referring to the USM). We proceed to test this conflict in the *Chevron* crucible.

1. Step One: Congressional Intent. At the outset, we must determine whether Congress has spoken with sufficient clarity to foreclose alternative interpretations. Statutory construction always starts—and sometimes ends— with the statute's text. Here, we find Congress's handiwork opaque. The problem is not ambiguity in definition. Rather, it is simply unclear from the bare language of the law which maxima and what categories Congress had in mind when it contrived section 994(h).

The earlier cases relating the word "maximum" to the ESM do not dictate a contrary conclusion. Those courts envisaged their primary task as interpreting the meaning of the guidelines, *see, e.g., Garrett*, 959 F.2d at 1010 (concluding that "the Guidelines require us to define the [term] Offense Statutory Maximum" in a particular way); *Amis*, 926 F.2d at 329 (stating the court's task as "merely [to] determine the 'Offense Statutory Maximum' as used in guidelines § 4B1.1"), and they did so without the aid of Amendment

506. Although two courts suggested that reading "Offense Statutory Maximum" as referring to the ESM would better effectuate congressional intent, *see Garrett*, 959 F.2d at 1010; *Sanchez-Lopez*, 879 F.2d at 559, neither of these courts held—or even hinted—that section 994(h) thwarted a different reading. We have found no indication that any of the courts which scrutinized the unexplicated version of U.S.S.G. § 4B1.1 detected the kind of clear, overarching congressional directive that would suffice to abort a *Chevron* inquiry.

Even were we to believe otherwise, two abecedarian principles of statutory construction nonetheless would counsel continuation of the *Chevron* journey. First, courts that read a statute without the aid of an authoritative interpretation by the agency charged with administering the statute must reexamine their reading if the agency later speaks to the point. *See International Ass'n of Bridge, Structural, and Ornamental Ironworkers, Etc. v. NLRB*, 946 F.2d 1264, 1271 (7th Cir.1991). Second, an agency that is charged with administering a statute remains free to supplant prior judicial interpretations of that statute as long as the agency interpretation is a reasonable rendition of the statutory text. *See id.* at 1270; *see also Rust v. Sullivan*, 500 U.S. 173, 186-87, 111 S.Ct. 1759, 1768-69, 114 L.Ed.2d 233 (1991) (holding that an agency is free to reverse its own previous interpretation of a statute, subject to the same condition); *Strickland*, 48 F.3d at 18 (same). Hence, we trek onward.

When the plain meaning of a law is not readily apparent on its face, the next resort is to the traditional tools of statutory construction—reviewing legislative history and scrutinizing statutory struc-

ture and design—in an effort to shed light on Congress's intent.[10]

As originally envisioned, section 994(h) would have placed the onus of imposing sentences "at or near the maximum" directly on sentencing judges. *See* S.Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358. The provision's author, Senator Kennedy, devised it as a means of putting "[c]areer criminals . . . on notice that their chronic violence will be punished by maximum prison sentences." 128 Cong.Rec. 26,518 (1982). But that proposal did not take wing; the Senate Judiciary Committee instead approved section 994(h) in its current incarnation. This version, unlike the rejected proposal, addresses its command to the Commission, not the courts. The Committee obviously believed that this change would better "assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug offenders." S.Rep. No. 98-225, *supra*, 1984 U.S.C.C.A.N. at 3358. We think that this history confirms

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[10] We acknowledge the ongoing debate over the propriety, under *Chevron*, of going beyond plain meaning analysis and resorting to the traditional tools of statutory construction in search of a clear congressional directive. *Compare INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48, 107 S.Ct. 1207, 1221-22, 94 L.Ed.2d 434 (1987) (suggesting that, under the first prong of *Chevron*, courts should employ "traditional tools of statutory construction") with id. at 454, 107 S.Ct. at 1225 (Scalia, J., concurring) (rejecting this statement). This court has followed *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781-82 n. 9, and employed the full tool chest of statutory construction implements in attempting to detect clear congressional meaning. *See, e.g., Strickland*, 48 F.3d at 19. We continue that practice in this case.

that (1) in creating the Commission, Congress had an overall goal of curtailing judicial discretion in sentencing matters; and (2) in enacting section 994(h), Congress had a specific intent to let the Commission (as opposed to individual judges) determine the best method for assuring that career offenders would receive stiff prison sentences. Past this point, the legislative archives offer no clue as to whether Congress ever recognized either the potential ambiguity of the term "maximum" or the uncertainty that might attach to the question of what constitutes a category of offenders.

Finding the relevant legislative history to be no clearer than the statute's text, we look to the enabling legislation and the overall structure of the Sentencing Reform Act for what insights they may afford. Superficially, these considerations seem to support the government's position that the "maximum" is the ESM. Reading "categories" narrowly enough to distinguish between offenders on the basis of whether the United States Attorney has filed sentence-enhancing informations yields potentially harsher sentences in those cases, thereby promising more stringent punishment for selected repeat offenders. That narrow reading also preserves the distinction between offenders who are subject to sentence enhancements based on prior criminal activity and those who are not—a distinction that Congress arguably delivered into the hands of prosecutors. *See, e.g.*, 21 U.S.C. §§ 841(b)(1), 851(a)(1).

Although these asseverations put the government's best foot forward, they are at most debating points in relation to the problem at hand. They neither indicate that Congress has spoken directly to the precise issue nor reflect a sufficiently clear congressional

intent to circumscribe the Commission's interpretive powers. Indeed, the arguments are circular; the touted advantages of the government's reading appear to be advantageous only if one assumes the conclusion that the government is struggling to prove.

We will not add hues to a rainbow. Because we find no clear congressional directive regarding the meaning of the term "maximum" as that term is used in section 994(h), our inquiry proceeds to the second half of the *Chevron* two- step.

2. Step Two: Plausibility of the Commission's Interpretation. Where, as here, a statute is not clear, an interpretation by the agency that administers it will prevail as long as the interpretation is reasonable under the statute. *See Strickland*, 48 F.3d at 21. We believe that the Commission's act in defining "maximum" to refer to the unenhanced maximum term of imprisonment—the USM—furnishes a reasonable interpretation of section 994(h). The statute explicitly refers to "categories of defendants," namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests. Unless one is prepared to write off Congress's choice of the word "categories" as some sort of linguistic accident or awkward locution—and we are not so inclined—this approach is eminently supportable.

Our dissenting colleague decries the Commission's categorical approach. He states that, indeed, "the phrase 'categories of defendants' is perhaps better understood . . . as a 'linguistic accident or an awkward

locution.'" *Post* at 1416. To the contrary, this conclusion is foreclosed by, inter alia, the following explicit language in 18 U.S.C. § 3553:

> (a) . . . The court, in determining the particular sentence to be imposed, shall consider—
>
> . . . .
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28 . . . . (Emphasis supplied).

Further inescapable evidence that the term "categories of defendants" is neither an accidental nor a recent congressional usage, see post at 1416-17 [44a], appears in 28 U.S.C. § 994(b)(1):

> *The Commission*, in the guidelines promulgated pursuant to *subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range* that is *consistent with all pertinent provisions of title 18*, United States Code. (Emphasis supplied).

Thus, rather than a recent slip of the legislative pen, the term "categories of defendants," as used in section 994(h), originated in the carefully incubated legislation mandating a guideline sentencing system that was to be promulgated and monitored by the Sentencing Commission, *see* 28 U.S.C. § 994, and implemented by the courts, *see* 18 U.S.C. § 3553. Among the more important innovations attending the

establishment of the new guideline sentencing system were certain restrictions on judicial consideration and weighting of individualized sentencing factors, *see, e.g.*, 18 U.S.C. § 3553(a)(4), (b), (c); hence, the possibly "awkward," but nonetheless plainly intended, usage "categories of defendants."

Given the identical statutory phrasing consistently employed by Congress in titles 18 and 28, as well as their coordinate design, we are unable to endorse the unsupported statutory interpretation advanced in dissent. Rather, we must follow the canons of statutory interpretation which demand that a court give meaning to each word and phrase when explicating a statute, and read the component parts of a legislative enactment as a unified whole. *See United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 101 (1st Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 1176, 130 L.Ed.2d 1128 (1995); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir.1985); *see also Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1st Cir.1992) ("It is . . . a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way."), *cert. denied*, 506 U.S. 1052, 113 S.Ct. 974, 122 L.Ed.2d 129 (1993).

Moreover, the Sentencing Reform Act places many restraints on the Commission apart from those embodied in section 994(h). The most salient of these restraints is the requirement of sentencing consistency. *See* 28 U.S.C. § 994(f). The Commission adverted to this concern in promulgating Amendment 506, *see* U.S.S.G., App. C, Amend. 506, at 409 (Nov. 1994), and responded to it by taking a categorical approach. Similarly, Congress's efforts to eliminate

sentencing disparities can be reconciled with section 994(h)'s exhortation for maximal sentencing only if one hears that exhortation as being addressed to categories of defendants. In the final analysis, the Commission remains fully faithful to the welter of congressional commands by choosing to treat repeat offenders as broad categories of defendants and thereby harmonizing the call for stringent punishment of recidivists with the call for consistent, non-disparate sentences.

The government lodges two further objections to the plausibility of the Commission's rationale. First, it contends that Congress, by means of such statutes as 21 U.S.C. § 851(a)(1), intended to give prosecutors commodious discretion over the potential sentences of repeat offenders, and that Amendment 506 frustrates this intent. Though the government may well be correct in asserting that Congress did not create the Sentencing Commission with an eye toward eradicating prosecutorial abuses, it does not follow that Congress strove affirmatively to give prosecutors the keys to the kingdom.[11] What is more, it makes very little sense to impute to Congress a yearning for unbridled prosecutorial discretion when two major goals of sentencing reform were to "assure that

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[11] The government makes much of the fact that the Senate Judiciary Committee, in creating the Commission, disclaimed any fear that the guidelines would increase prosecutors' discretion to reduce sentences through plea bargains. *See* S.Rep. No. 98-225, *supra*, 1984 U.S.C.C.A.N. at 3246. But Congress's explanation (which stressed that the Commission could guard against this phenomenon because it was empowered to issue policy statements concerning the review of plea bargains, *see id.*), is indicative of the latitude it intended to give *to the Commission*.

sentences are fair both to the offender and to society," S.Rep. No. 98-225, *supra*, 1984 U.S.C.C.A.N. at 3222, and to "avoid [ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B).

The government's remaining objection to the Commission's reading of the word "maximum" is that this reading prescribes an identical sentencing range for repeat offenders whether or not the prosecution has sought to obtain sentence enhancements. This reading, the government says, effectively eliminates prosecutorial enhancements and arrogates unto the Commission the authority that Congress explicitly vested in the United States Attorney. We find this polemic unpersuasive.

We take 21 U.S.C. § 841(b)(1) as our point of departure. This section establishes unenhanced maximum terms applicable to all violators, enhanced maximum terms applicable to certain repeat offenders, and, in some cases, mandatory minimum terms of incarceration (enhanced or unenhanced). It is elementary that any guideline which prescribes a sentence that falls within these parameters does not conflict with the statute. What remains is a policy choice, and the Commission, by opting to emphasize the USM, has done no more than exercise its prerogative to make precisely this kind of policy choice. *See Chevron*, 467 U.S. at 864, 104 S.Ct. at 2792.

Furthermore, the choice is not unreasonable. The root purpose of the Career Offender Guideline, U.S.S.G. § 4B1.1, is to enhance repeat offenders' sentences. The revamped guideline not only accomplishes that purpose but also coheres with

Congress's discernible aims in making enhanced penalties available under section 841. While that statute establishes a *possible* enhanced penalty for repeat offenders if prosecutors choose, the Career Offender Guideline, as filtered through Amendment 506, ensures an *actual* enhancement of the TOL for all repeat offenders. This critical distinction belies the government's lament that the amendment sounds a death knell for enhancements required by statute. The guideline, section 4B1.1, as explicated by Amendment 506, departs from the statute, section 841, only in the sense that the former seeks to enhance the sentences of a wider class of recidivists. This departure lacks significance. For purposes of testing the fidelity of the sentencing guidelines' career offender provisions to the statutory scheme, it is irrelevant that some sentences beyond those mandated by Congress are also enhanced.

When all is said and done, the Commission's decision to treat the word "maximum" as meaning the unenhanced statutory maximum applicable to a category of offenders, broadly defined, is a plausible rendition of section 994(h). We must honor the Commission's definition.

C. THE SECOND CONUNDRUM.

As we have previously explained, section 994(h) contains a specific directive that, in the case of career offenders, sentences ought to be "at or near the maximum term authorized." The government contends that, regardless of how the word "maximum" is construed, Amendment 506 is invalid because it fails to produce sentences that are "at or near" any conceivable maximum. As before, we measure this contention by wielding the *Chevron* yardstick.

1. Step One: Congressional Intent. At the risk of belaboring the obvious, we start from the premise that "at or near" is neither an exact nor a self-defining term. Section 994(h) is silent as to how "near" sentences must be to the maximum, and the legislative history is singularly unhelpful on this point. Especially since we must concentrate on the USM in calculating how "near" the Commission's sentencing ranges are to the statutory goal, see *supra* Part III(B), we are unable to divine a sufficiently clear expression of congressional intent. Thus, we quickly move to the second—and decisive—portion of the Chevron query.

2. Step Two: Plausibility of the Commission's Interpretation. The question of plausibility reduces to whether the Career Offender Guideline, as now interpreted by the Commission, sufficiently ensures sentences that satisfy a reasonable construction of "at or near the maximum." In this setting, deference to the Commission is especially appropriate. "At or near" is an inherently variable phrase. In speaking with a Texan, one might say that Providence is "near" Boston, but it is doubtful if that description would (or could) be employed in speaking with a resident of, say, Cambridge or Cranston. In all events, the phrase "at or near," as employed in this statute, suggests a continuum of various sentences, each relatively further from, or closer to, the statutory maximum.

It is also important to recognize that the career offender enhancement is not the end point of the sentencing road and, by itself, does not dictate individual defendants' sentences. Once the "Offense Statutory Maximum" derived from the Career Offender Guideline functions to yield a defendant's

TOL, the sentencing court must then make a myriad of individualized adjustments to the offense level, up or down, for factors such as acceptance of responsibility *see* U.S.S.G. § 3E1.1, role in the offense, *see* U.S.S.G. §§ 3B1.1, 3B1.2, and the like. It is only when all the component parts of the sentencing equation are pulled together that the court can ascertain the range of permissible sentences and, hence, settle upon the actual sentence. Even then, the court retains authority, at least in certain circumstances, to depart downward if a particular defendant furnishes substantial assistance in the investigation or prosecution of another person who has committed an offense, *see* 18 U.S.C. § 3553(e); U.S.S.G. s 5K1.1, or to depart in either direction if aggravating or mitigating circumstances warrant, *see* 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0. Many of these prospective adjustments derive from explicit statutory commands. *See, e.g.*, 28 U.S.C. § 994(n) (directing the Commission to create a mechanism through which defendants will be rewarded for rendering substantial assistance).

We believe that this reality has significant implications for the question at bar. First and foremost, given the labyrinthine way in which repeat offenders' actual sentences are constructed, heightened deference to the Commission's slant on the "at or near" language is very desirable. After all, respect for agency interpretations is "particularly appropriate in complex and highly specialized areas where the regulatory net has been intricately woven," *Com. of Massachusetts, Dep't of Educ. v. United States Dep't of Educ.*, 837 F.2d 536, 541 (1st Cir.1988) (citation and quotation marks omitted), and the sentencing guidelines constitute a classic example of such a web. In other words, due to the interstitial nature of the

career offender calculation, a reviewing court should be generous in assessing the reasonableness of the Commission's approximation of how "near" is "near."

The fact that the career offender adjustment does not itself directly determine any particular defendant's actual sentence has other implications as well. Unless one is ready to place any and all downward adjustments beyond a repeat offender's reach—and even the government does not espouse so extreme a position—it is surpassingly difficult (if not impossible) to expect the Commission to write a rule which ensures that career offenders will invariably receive sentences "at or near" each individual's ESM. Once a sentencing court has made such downward adjustments, it would be surprising if many defendants' sentences came very near to the statutorily prescribed "maximum" penalties that are theoretically available (however the word "maximum" may be defined). By like token, the very real possibility that upward adjustments to the TOL may make career offenders' sentences more severe suggests that room should be left for play in the joints as the Commission implements the "at or near" language.

Mindful, as we are, of these complexities, we think that Amendment 506 passes muster. The sentences available under the newly explicated Career Offender Guideline constitute a substantial proportion of the possible sentences permitted by statute. We can conveniently illustrate the point by reference to the four defendants who are involved in these appeals. By operation of Amendment 506, defendants like LaBonte, Hunnewell, and Dyer now face maximum sentences of 262 months (the top of the recalculated GSR) before taking into account any individualized adjustments. A 262-month sentence represents

109.2% of the USM for these defendants' offense of conviction.[12] On the same basis, a defendant like Piper now faces a maximum sentence of 365 months (76% of the applicable USM). Examining the gamut of possible sentences available against each defendant under Amendment 506, the median sentence in the range applicable to LaBonte, Hunnewell, and Dyer (236 months) constitutes 98.3% of the USM, while the median sentence in the range pertinent to Piper (294.5 months) constitutes 61.4% of the USM. Under any suitable definition of the word "near," we believe that the Commission could reasonably conclude that these percentages ensure sentences sufficiently close to the USM—and sufficiently harsh—to provide a fair approximation of Congress's desire to see that career offenders, as a group, receive maximal terms of imprisonment.

IV. THE APPLICATION OF AMENDMENT 506

Having determined that Amendment 506 is a lawful exercise of the Sentencing Commission's powers, we now address the motions for resentencing.

The principles governing motions to resentence based on newly emergent guideline amendments can be compactly catalogued. When the Commission amends the guidelines (or its interpretation of the guidelines) in a manner that favors defendants, it may invite retrospective application of the new inter-

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[12] We think that this calculation graphically illustrates the fallacy underlying our dissenting brother's lament that Amendment 506, "effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841." *See post* at 1415.

pretation.[13] In such an event, a defendant who believes that the amendment, if in force earlier, would have reduced his GSR may move for resentencing. The district court, "after considering the factors set forth in section 3553(a) to the extent that they are applicable," may reduce the sentence "if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).[14] The law permits, but does not require, the district court to resentence such a defendant. *See United States v. Connell*, 960 F.2d 191, 197 (1st Cir.1992). Because this decision is committed to the trial court's discretion, the court of appeals will interfere only if the record reveals a palpable abuse of that discretion. *See United States v. Pardue*, 36 F.3d 429, 430 (5th Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 1969, 131 L.Ed.2d 858 (1995); *United States v. Telman*, 28 F.3d 94, 96-97 (10th Cir.1994); *see also*

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[13] For this purpose, an "amendment" differs from a "clarification." Clarifications explain earlier editions of the sentencing guidelines; they do not change those provisions. Because they are retrospective by nature, they do not require any special retroactivity designation. *See* U.S.S.G. § 1B1.11(b)(2); *see also United States v. LaCroix*, 28 F.3d 223, 227 n. 4 (1st Cir.1994). In contrast, amendments do change prior guidelines and, if they are to be given retroactive effect, the Commission must so specify. *See* 28 U.S.C. § 994(u); U.S.S.G. § 1B1.10. This opinion deals exclusively with amendments as opposed to clarifications.

[14] The factors set forth in section 3553(a), insofar as they are arguably applicable to any of the instant defendants, include the nature and circumstances of the offense, the defendant's criminal past, the GSRs, the Commission's policy statements, and the necessity of avoiding unwarranted sentencing disparities among similarly situated defendants. *See* 18 U.S.C. § 3553(a).

United States v. Twomey, 845 F.2d 1132, 1134 (1st Cir.1988). It is plain that, under this paradigm, most resentencing battles will be won or lost in the district court, not in an appellate venue.

With this brief preface, we reach the individual defendants' cases.

A. GEORGE LABONTE.

In LaBonte's case, the district court upheld Amendment 506 and applied it to reduce the defendant's sentence. *See LaBonte*, 885 F.Supp. at 24. Although the government appeals from the reconfigured sentence, it challenges only the lower court's validation of the reinterpreted Career Offender Guideline. Because the government has neither asserted nor argued a claim that the court abused its considerable discretion in reducing LaBonte's sentence, we must affirm the judgment. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

B. DAVID E. PIPER.

In Piper's case, the district court upheld Amendment 506 but refused to mitigate the original sentence. Piper proffers a potpourri of protests to the court's ruling. Only two of them warrant discussion.

First, Piper suggests that under 18 U.S.C. § 3582(c)(2) a district court may only decide whether the policies underlying an amendment would be served by a lessened sentence. Piper misreads the statute: it authorizes the district judge to resentence when resentencing is consistent with the policies underlying the amendment, but it neither compels the judge to do so nor limits his inquiry to the consistency question. Since the language is precatory

rather than mandatory, the district court need not even consider the policy statements supporting an amendment if, "after considering the factors set forth in § 3553(a) to the extent they are applicable," 18 U.S.C. § 3582(c)(2), the court prefers to stand by the existing sentence.

Piper's next remonstrance suggests that the district court failed to reweigh the factors delineated in section 3553(a), *see supra* note 14, and that, therefore, the court's decision cannot constitute a proper exercise of judicial discretion. The problem with this remonstrance lies in its premise. The district judge presided over Piper's case from the outset. He possessed great familiarity with the odious nature of the offense of conviction (leading a "commando-style" raid on a family's home while heavily armed, and searching for a stash of illegal drugs supposedly secreted there). Having sentenced Piper originally, he knew the intimate details of Piper's criminal history. At the hearing on the motion to resentence, the judge listened to arguments that zeroed in on the very factors that Piper now claims were overlooked.

In the end, Piper's argument invites us to elevate form over substance. We decline the invitation. Where, as here, it is clear that the sentencing judge has considered the section 3553(a) factors, we will not interpose a further requirement that he make explicit findings as to each and all of those factors. *See United States v. Savoie*, 985 F.2d 612, 618 (1st Cir.1993) (holding that a district court need not make explicit findings regarding the statutory factors relevant to restitution orders "so long as the record on appeal reveals that the judge made implicit findings or otherwise adequately evinced his con-

sideration of those factors"); *United States v. Wilfred Am. Educ. Corp.*, 953 F.2d 717, 720 (1st Cir.1992) (similar, in respect to fines); *see generally United States v. Tavano*, 12 F.3d 301, 307 (1st Cir.1993) ("As a general rule, a trial court lawfully may make implicit findings with regard to sentencing matters. . . ."). On this record, it strains credulity to suggest that the district court neglected to take account of statutorily required items in its decisionmaking process.

C. ALFRED LAWRENCE HUNNEWELL.

In Hunnewell's case, the district court held that Amendment 506 was invalid, and refused to apply it *for that reason*. Having concluded that the lower court erred, *see supra* Part III, we ordinarily would remand for further proceedings. But the government has other ideas; it asserts that the district court's order should be construed as an exercise of discretion, and it asks us to affirm the denial of Hunnewell's resentencing request on this basis.

After a painstaking examination of the record, we reject the government's asseveration. Calling a horse a cow does not yield milk. Indeed, the government tacitly concedes the weakness of its position by forgoing developed argumentation on this point and instead regaling us with the reasons why the district could (or should) have declined to extend an olive branch to Hunnewell. The fact remains, however, that the discretion conferred by 18 U.S.C. § 3582(c)(2) is for the district court—not this court—to exercise in the first instance. Consequently, the denial of Hunnewell's motion for resentencing must be set aside and the cause remanded for further consideration of that motion.

Before leaving Hunnewell's situation, we pause to comment on the government's suggestion that, because Hunnewell's original sentence was still within the post-amendment GSR (albeit barely), we need not afford the district court an opportunity to decide whether to resentence him.[15]

In its haste to validate this argument, the government distorts our holding in *United States v. Ortiz*, 966 F.2d 707 (1st Cir.1992), *cert. denied*, — U.S. ——, 113 S.Ct. 1005, 122 L.Ed.2d 154 (1993). In *Ortiz*, we explained that,

> where it appears reasonably likely that the district judge selected a sentence because it was at or near a polar extreme (whether top or bottom) of the guideline range that the judge thought applicable, the court of appeals should vacate the sentence and remand for resentencing if it is determined that the court erred in its computation of the range, notwithstanding that there may be an overlap between the "right" and "wrong" sentencing ranges sufficient to encompass the sentence actually imposed.

Id. at 717-18. So it is here. In Hunnewell's initial sentencing hearing, both the government and the defense asked the court to impose a sentence at the bottom of the GSR. The court obliged. Giving vitality to the foundational principle on which *Ortiz* rests, we cannot be confident that, faced with a different range of options, the district court's choice will remain the same.

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[15] The district court initially computed a GSR of 188-235 months, and sentenced Hunnewell to serve 188 months in prison. Applying Amendment 506 to Hunnewell's case yields a revised GSR of 151-188 months. *See supra* note 4.

D. STEPHEN DYER.

Since Dyer's and Hunnewell's cases are virtually on all fours vis-a-vis the posture of the resentencing issue, we need not linger. For the reasons already expressed, *see supra* Part IV(C), Dyer is entitled to have the district court address the merits of his request for resentencing.

V. THE SECTION 2255 PETITION

Dyer also appeals from the district court's summary dismissal of his section 2255 petition. A district court may dismiss a section 2255 petition without holding an evidentiary hearing if it plainly appears on the face of the pleadings that the petitioner is not entitled to the requested relief, or if the allegations, although adequate on their face, consist of no more than conclusory prognostications and perfervid rhetoric, or if the key factual averments on which the petition depends are either inherently improbable or contradicted by established facts of record. *See United States v. McGill*, 11 F.3d 223, 225 (1st Cir.1993); *see also* 28 U.S.C. § 2255 (explaining that a hearing is unnecessary when the record "conclusively shows that the prisoner is entitled to no relief").

We believe that Dyer's petition is both generally and specifically defective. Taking first things first, the district court noted that Dyer had not presented his factual allegations under oath, and that, therefore, he was not entitled to the relief that he sought. We agree.

Dyer's sworn petition contained nothing more than the bare statement that he received ineffective assistance of counsel. While some additional allegations were set forth in Dyer's memorandum of law, those allegations did not fill the void. A habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. *See, e.g.*, Rule 2, Rules Governing Section 2255 Proceedings, 28 U.S.C. § 2255. Facts alluded to in an unsworn memorandum will not suffice. *See Barrett v. United States*, 965 F.2d 1184, 1195 (1st Cir.1992); *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir.1974).

Even were we prepared to overlook this fatal shortcoming, the petitioner would not find surcease. We review claims of constitutionally deficient performance on counsel's part under the familiar test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). According to this regime, a criminal defendant who alleges ineffective assistance must demonstrate that his attorney's performance was unreasonably deficient, and that he was prejudiced as a result of it. *See Scarpa v. Dubois*, 38 F.3d 1, 8 (1st Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995). When, as in this case, a defendant has pleaded guilty to a charge, the prejudice prong of the test requires him to show that, but for his counsel's unprofessional errors, he probably would have insisted on his right to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370-71, 88 L.Ed.2d 203 (1985).

In light of these authorities, we think that the district court appropriately dismissed Dyer's habeas petition. In his brief, Dyer contends, *inter alia*, that his trial attorney assured him that his sentence

would be no more than eighteen months, and that there was simply "no way" that he would be sentenced as a career offender pursuant to U.S.S.G. § 4B1.1. Even a generous reading of this claim leaves no doubt that Dyer failed adequately to allege any cognizable prejudice. An attorney's inaccurate prediction of his client's probable sentence, standing alone, will not satisfy the prejudice prong of the ineffective assistance test. *See Knight v. United States*, 37 F.3d 769, 774 (1st Cir.1994). Similarly, Dyer's self-serving statement that, but for his counsel's inadequate advice he would have pleaded not guilty, unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial, is insufficient to demonstrate the required prejudice. *See United States v. Horne*, 987 F.2d 833, 835 (D.C.Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 153, 126 L.Ed.2d 115 (1993); *United States v. Arvanitis*, 902 F.2d 489, 494 (7th Cir.1990).

To add the finishing touch, the plea agreement that Dyer signed stated in so many words that he faced a maximum possible sentence of thirty years' imprisonment. The district court reinforced this warning during the plea colloquy, and explained to Dyer that his sentence could not be calculated with certitude until the probation office prepared the presentence investigation report. In response to questioning from the bench, Dyer acknowledged his understanding that even if he received a harsher-than-expected sentence, he would remain bound by his plea. And Dyer also assured the court that no one had made any promises to him anent the prospective length of his sentence. Thus, regardless of his counsel's performance, Dyer was well aware of the full extent of his possible

sentence when he decided to forgo a trial and enter a guilty plea.

Under the applicable constitutional standard, a failure of proof on either prong of the *Strickland* test defeats an ineffective-assistance-of-counsel claim. *See Scarpa*, 38 F.3d at 8-9. Since we find no cognizable prejudice, we need not determine what Dyer's trial attorney did or did not tell him, or whether the attorney lacked familiarity with the sentencing guidelines to such an extent as to render his performance constitutionally infirm.

We have also considered Dyer's other assignments of error. His plaint that the district court acted precipitously in dismissing the petition without first pausing to convene an evidentiary hearing is meritless. *See, e.g., McGill*, 11 F.3d at 226; *United States v. Butt*, 731 F.2d 75, 80 n. 5 (1st Cir.1984). His remaining claims are unworthy of detailed discussion. The lower court did not blunder in summarily dismissing Dyer's application for federal habeas relief.

VI. CONCLUSION

We need go no further. For the reasons discussed herein, we affirm the judgments in the LaBonte and Piper cases (Nos. 95-1538 and 95-1226, respectively); remand for possible resentencing in the Hunnewell case (No. 95- 1101); and affirm the judgment in the Dyer case (No. 95-1264) in part, but vacate it in part and remand for possible resentencing. We intimate no view as to how the district court should resolve the remaining resentencing questions.

So Ordered.

STAHL, Circuit Judge (concurring in part and dissenting in part).

With all due respect, I disagree with my colleagues that the phrase "maximum term authorized" in 28 U.S.C. § 994(h) supports more than one plausible interpretation. In endeavoring to set forth an analytically sound basis for their decision, my colleagues find ambiguity where none exists. After careful review, I believe that, when applied to defendants subject to special enhanced penalty provisions, the only plausible interpretation of the phrase "maximum term authorized" is the enhanced maximum punishment. Furthermore, once the phrase "maximum term authorized" is correctly read as referring in these instances to the enhanced statutory maximum, I think it clear that the sentencing scheme propounded by Amendment 506 does not satisfy Congress's clear command to sentence career offenders at or near that maximum. Accordingly, I dissent with respect to parts I-IV.

I.

In reaching their conclusion, my colleagues engage a full-blown Chevron inquiry twice, carefully analyzing the phrases "maximum term authorized," "categories of defendants" and "at or near."[16] On the first

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[16] 28 U.S.C. § 994(h) provides:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment *at or near the maximum term authorized* for categories of defendants in which the defendant is eighteen years old or older and (1) has been convicted of a felony that is

(A) a crime of violence; or

pass, they find, depending on the meaning ascribed to the term "categories," that the phrase "maximum term authorized" is susceptible to two different plausible interpretations. If the term "categories" is defined so that it recognizes the distinctions between defendants subject to special enhanced penalties and those who are not, then the phrase "maximum term authorized" must mean the enhanced statutory maximum when referring to the former and the unenhanced statutory maximum when referring to the latter. They define this as the enhanced statutory maximum ("ESM") interpretation. On the other hand, my colleagues contend, that if the term "categories" is read more broadly such that it fails to recognize these distinctions, then the phrase "maximum term authorized" must mean in all cases the unenhanced statutory maximum because that is the highest possible sentence applicable to all defendants in the category. They define this as the unenhanced

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(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. [§] 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. [§§] 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C.App. [§] 1901 et seq.) and

(2) has previously been convicted of two or more prior felonies, each of which is

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. [§] 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. [§§] 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C.App. [§] 1901 et seq.)

(Emphasis added.)

statutory maximum ("USM") interpretation. My colleagues then conclude that, because both interpretations are plausible, Congress has not spoken clearly or without ambiguity on the issue and, therefore, we should defer to the Commission's choice between the two. I disagree with this analysis because I do not believe that the USM interpretation is a plausible reading of the phrase "maximum term authorized."

Principally, I find the USM interpretation inherently implausible because it effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841. These statutes, to which Congress expressly referred in the text of § 994(h), provide an intricate web of enhanced penalties applicable to defendants who are repeat offenders or whose offenses resulted in death or serious bodily injury. The USM interpretation, however, completely disregards these enhanced penalties because, under that interpretation, all defendants must be sentenced at or near the unenhanced maximum whether or not the enhanced penalties apply. Recognizing that Congress specifically referred to these statutes in the text of § 994(h), it seems absurd to suppose that Congress did not intend to preclude this result. A plausible reading of a statute would not render meaningless complete sections of other statutes to which it refers.[17]

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[17] The majority contends that this argument is of little moment because a Career Offender guideline using the USM interpretation as espoused by Amendment 506 does not technically conflict with 21 U.S.C. § 841 or the other enhanced penalty statutes. While I agree that there may be no technical "conflict," I hardly take that as evidence that Congress intended to permit the Commission in interpreting § 994(h) to *nullify* many of the special enhanced penalties.

The reasoning of the District of Columbia Circuit in *United States v. Garrett*, 959 F.2d 1005, 1010-11 (D.C.Cir.1992), firmly supports this analysis. In *Garrett*, the court rejected the argument that the guideline phrase "Offense Statutory Maximum" should be read to refer to the unenhanced statutory maximum. *Id.* The court explained that such an interpretation (which I note necessarily requires interpreting the phrase "maximum term authorized" in § 994(h) to mean the unenhanced maximum) would "thwart congressional intent." *Id.* at 1011. The court reasoned that to conclude that "Congress . . . intended to erase the statutory distinctions among offenders based either on their past actions or on the circumstances of the offense, distinctions carefully set forth in subsection 841(b)(1)(B) *would be senseless.*" *Id.* (emphasis added). While it is true that *Garrett* involved only the interpretation of "Offense Statutory Maximum" and did not directly consider the statutory language, I think its analysis is informative and applies with equal force to the question at hand. Indeed, prior to the promulgation of Amendment 506, the Commission defined the guideline phrase "Offense Statutory Maximum" as equivalent to the statutory phrase "maximum term authorized." *See* U.S.S.G. § 4B1.1, comment. (n. 2) (Nov. 1993).[18]

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[18] Other circuits have interpreted "Offense Statutory Maximum" similarly. *United States v. Smith*, 984 F.2d 1084, 1086-87 (10th Cir.) (similarly interpreting "Offense Statutory Maximum"), *cert. denied*, — U.S. ——, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Amis*, 926 F.2d 328, 330 (3d Cir.1991) (same); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-560 (9th Cir.1989) (same).

Furthermore, I believe the legislative history strongly suggests that Congress intended "maximum term authorized" to refer, in appropriate circumstances, to the enhanced maximum penalty. The Senate Judiciary Committee noted that § 994(h) was enacted to replace the sentencing provisions for "dangerous special offenders" and "dangerous special drug offenders" provided respectively by 18 U.S.C. § 3575 (repealed 1984) and 21 U.S.C. § 849 (repealed 1984). *See* S.Rep. 225, 98th Cong.2d Sess. 120 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3303. These two provisions enabled courts to sentence "dangerous" defendants to terms "of imprisonment longer than that which would ordinarily be provided." S.Rep. 225 at 117, *reprinted in* 1984 U.S.C.C.A.N. at 3300; *see United States v. Thornley*, 733 F.2d 970, 972 (1st Cir.1984) (affirming "dangerous special offender" sentence that exceeded the maximum prescribed sentence for the underlying offense). A defendant was subject to sentencing under these provisions upon, *inter alia*, a finding of dangerousness. Specifically, a defendant was considered dangerous if a term of imprisonment "*longer than the maximum* provided in the statute defining the [underlying] felony '[was] required for the protection of the public.'" S.Rep. 225 at 117, *reprinted in* 1984 U.S.C.C.A.N. at 3300 (quoting 18 U.S.C. § 3575(f) and 21 U.S.C. § 849(f)) (emphasis added). As this definition makes clear, the purpose of these special offender statutes was to provide, in appropriate circumstances, enhanced punishment beyond that otherwise provided in the underlying statute. *See, e.g., United States v. Sutton*, 415 F.Supp. 1323, 1324 (D.D.C.1976). This is exactly the same rationale underlying the enhanced penalty provisions found in statutes like 21 U.S.C. § 841.

Because Congress intended § 994(h) to address these "same considerations," *see* S.Rep. 225 at 120, *reprinted in* 1984 U.S.C.C.A.N. at 3303, it seems reasonable to conclude that Congress intended "maximum term authorized" to mean the enhanced statutory maximum.[19]

In sum, because the USM interpretation would render ineffective the enhanced penalties provided in statutes like 21 U.S.C. § 841 and because the legislative history strongly suggests that Congress intended the phrase "maximum term authorized" to mean the enhanced statutory maximum, I believe deferring to the Commission's interpretation of the phrase "maximum term authorized" in § 994(h) is inappropriate.

In passing, I further note that, in large part, my colleagues' argument turns on their analysis of the term "categories" found in § 994(h). Indeed, they can only import ambiguity into the narrow phrase "maximum term authorized," by first deeming the expression "categories of defendants" fatally imprecise. Moreover, they justify the USM interpretation by

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[19] In concluding that the legislative history fails to disprove the plausibility of the unenhanced interpretation, the majority quotes the Judiciary Committee's opinion that §§ 994(h) and 994(i) would "assure the consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent and repeat drug offenders." S.Rep. No. 225 at 175, *reprinted in* 1984 U.S.C.C.A.N. at 3358. While this statement clearly suggests that the Committee trusted the Commission more than individual judges to see that recidivist defendants were sentenced at or near the maximum term authorized, it in no way suggests that Congress intended to grant the Commission the authority to disregard the sentencing enhancements provided in 21 U.S.C. § 841 and other similar statutes.

reasoning that any other interpretation would write off "the word 'categories' as some sort of linguistic accident or awkward locution."

With all due respect, I find the phrase "categories of defendants" much less troubling. First, I note that "categories" is inherently a general, imprecise term, whereas I believe "maximum" is naturally a specific, precise one. Hence, I find it eminently more plausible, in this context, to read the phrase "categories of defendants" narrowly—as referring to classes of defendants subject to specific enhanced penalties—than it is to read the phrase "maximum term authorized" broadly—as referring to, with respect to certain defendants, something less than the maximum (*i.e.*, under the USM interpretation, some defendants who are subject to enhanced penalties will be sentenced at or near the unenhanced maximum, which, with respect to those defendants, is not the authorized statutory maximum).

Second, I do indeed believe that the phrase "categories of defendants" is perhaps better understood, to use my colleagues' phraseology, as a "linguistic accident or an awkward locution." As I note *infra*, at 1418-19 [48a-50a], Congress added § 994(h) to the enabling legis-lation late in the drafting process. The subsection derives from a sentencing provision attached to other legislation that directed judges to sentence career criminals to the maximum possible penalty. In attaching it to the enabling legislation, Congress rewrote the provision borrowing the phrase "cate-gories of defendants" and other language from the already-existing § 994(i).[20]

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[20] 28 U.S.C. 994(i) provides:

In contrast with § 994(h), § 994(i)'s usage of the phrase "categories of defendants" is sensible in light of that subsection's structure. First, § 994(i) broadly instructs the Commission to assure that various "categories of defendants" shall receive "substantial" sentences, and then it proceeds to list five different "categories" of defendants to which the instruction applies. In contrast, § 994(h)'s usage of the term "categories" is peculiar. *See*, *supra*, note 16. First, § 994(h)'s sentencing command (*i.e.*, "at or near the maximum term authorized") is more precise than § 994(i)'s broad command (*i.e.*, "substantial"), and, second, its structure is different: it does not sequentially enumerate separate categories of defendants to which the command applies. Hence, I believe the para-

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> The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—
>
> (1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;
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> (2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;
>
> (3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;
>
> (4) committed a crime of violence that constitutes a felony while on release pending trial, sentence or appeal from a Federal, State, or local felony for which he was ultimately convicted; or
>
> (5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. [§§] 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

llel language in the two subsections is best understood as principally revealing Congress's intent that the two subsections should be read together. In other words, by using the parallel language, Congress awkwardly expressed its intent that § 994(h) should be read as carving out a narrow subset of criminals, otherwise subject to the broader § 994(i), that should be sentenced, not just substantially, but at or near the maximum penalty possible.

In any event, because I believe that the phrase "maximum term authorized" cannot plausibly be interpreted to mean the unenhanced maximum, I likewise believe that "categories of defendants" must be read narrowly.

II.

Deciding that the phrase "maximum term authorized" means, in the appropriate circumstances, the enhanced statutory maximum does not end the analysis. It is still necessary to consider whether the sentencing scheme propounded by Amendment 506 nonetheless satisfies Congress's directive to sentence career offenders "at or near" the maximum.[21]

The defendants contend that, when read in context, § 994(h)'s "at or near" directive is unclear and ambiguous, *see United States v. Fountain*, 885 F.Supp. 185, 188 (N.D.Iowa 1995), and, accordingly, this court should defer to the Commission's reasonable interpretation. Moreover, the defendants argue that § 994(h) is only one of many congressional directives which the Commission had the responsibility and duty to harmonize in promulgating the sentencing

[21] I do not restate the facts or describe how the Career Offender guideline operates. For a thorough discussion of these matters *see Majority Opinion* at 1400-03.

guidelines. Specifically, the defendants note that one of the main purposes of the Sentencing Commission is to reduce "unwarranted disparities" in sentencing and, thus, assure that individuals who have committed similar acts receive similar sentences. *See* 28 U.S.C. 991(b)(1)(B). They maintain that Amendment 506 achieves this goal because it eliminates "unwarranted" disparity resulting from exercise of unchecked prosecutorial discretion in deciding whether or not to seek the enhanced penalties provided in statutes like § 841.

In response, the government contends that Amendment 506 is invalid because it is inconsistent with the plain language of 28 U.S.C. § 994(h). The government argues that the sentencing ranges resulting from application of the amendment do not satisfy § 994(h)'s clear command that career offenders should be sentenced "at or near" the maximum term authorized. I agree with the government.

First, in analyzing 28 U.S.C. § 994(h), I disagree with the defendants that its command that career offenders should receive sentences "at or near" the statutory maximum is unclear and ambiguous. Though Congress undoubtedly could have been more precise in limiting the Commission's discretion in this context, the phrase "at or near" has a fairly unambiguous and narrow ordinary meaning. Common definitions of the term "near" specify that an object (or limit) is "near" another if it is "not a far distan[ce] from" or "close to" the other object (or limit). *Webster's Third New International Dictionary* (1986); *accord The American Heritage Dictionary* (2d College Ed.1985) (defining "near" as "To, at, or within a short distance or interval in space or time."). The Commission's attempt to implement the "at or near"

directive (as ultimately expressed in Amendment 506), however, does not satisfy this standard. For example, under Amendment 506, a defendant who qualifies as a Career Offender and whose punishment has been enhanced pursuant to 21 U.S.C. § 841(b)(1)(C) to a maximum possible penalty of thirty years is assigned a base sentencing range of only 210 to 262 months. Such a range is but 58.3 to 72.78 percent of the maximum possible term of thirty years (360 months). Notwithstanding a certain amount of ambiguity in the term "near" at the margins, I think it plainly obvious that a guideline interpretation that, even before any adjustment for acceptance of responsibility, prescribes such a sentencing range does not assure that defendants will be sentenced "at or near" the maximum term authorized.

Moreover, a comparison of § 994(h) with § 994(i) makes clear beyond doubt that Congress intended the language "at or near" to limit narrowly the Commission's discretion to prescribe sentencing ranges for career offenders. Subsection 994(i), which was added to the enabling legislation in the Senate prior to the addition of § 994(h),[22] provides that the "Com-

[22] The guidelines enabling legislation, ultimately enacted in 1984, has a long and complex legislative history. *See generally* Kate Stith & Steve Y. Koh, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 Wake Forest L.Rev. 223 (1993). Indeed, the legislation enacted in 1984 traces its roots to a sentencing reform measure originally introduced by Senator Kennedy in 1975. *Id.* at 225. Subsection 994(i) first appeared in a Senate version of the legislation in 1978. *See* S. 1437, 95th Cong., 2d Sess. § 124 (1978) (proposed tit. 28, § 994(h)); 124 Cong.Rec. 1463 (1978). The Senate subsequently added § 994(h) to a later version of the legislation in 1983. *See* S. 668, 98th Cong., 1st Sess. § 7 (1983 (proposed tit. 28, 994(h))); 129 cong. Rec. 22,883 (1983). Both provisions were part of the guidelines enabling legislation ultimately enacted in 1984. Pub.L. No. 98-473, § 217, 98 Stat. 2021-22 (codified as amended 28 U.S.C. §§ 994(h), (i)).

mission shall assure that the guidelines specify a sentence to a *substantial term* of imprisonment" for habitual offenders, racketeers, defendants who commit crimes while released on bail, and felony drug offenders. 28 U.S.C. § 994(i) (emphasis added).[23] Subsection 994(i) applies to a broad class of defendants including all defendants subject to § 994(h). *Id.* § 994(i)(1) (subsection applies, *inter alia*, to all defendants who have "a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions"). Subsection 994(h), on the other hand, applies to a narrower subset of defendants that Congress felt must be punished even more stringently. In offering the original version of § 994(h), Senator Kennedy argued that the amendment was needed because "Career criminals must be put on notice that their chronic violence will be punished by *maximum prison sentences* for their offenses, *without parole*."[24] 128 Cong.Rec. 26,518 (1982) (emphasis added). By adding § 994(h), Congress sought to indicate that certain career offenders, with serious criminal histories, should receive not simply a "substantial term of imprisonment" as prescribed by 994(i), but instead a term of imprisonment that was

[23] *See, supra*, note 20.

[24] Section 994(h) derives from an amendment originally offered in 1982 by Senator Kennedy to S. 2572. *See* S.Rep. 225 at 175, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358. The 1982 amendment provided in relevant part that "A career criminal shall receive the maximum or approximately the maximum penalty for the current offense." 128 Cong.Rec. 26,511-12 (1982).

at or near the statutory maximum. Indeed, if § 994(h) is only, as the defendants argue, a general admonishment—which the Commission has broad discretion to implement— to punish career offenders more harshly than it otherwise would, the subsection adds little direction not already provided by § 994(i).[25]

Second, the basic structure of the enabling legislation undercuts the defendants' argument that this court should defer to the Commission's attempt to harmonize § 994(h) with other purportedly conflicting congressional directives. The goal of avoiding unwarranted sentencing disparities is, indeed, one of the broad underlying purposes that motivated Congress's creation of the Sentencing Commission. *See* 28 U.S.C. § 991(b)(1)(B). Though Congress restated the goal as one of the directives to which the Commission should "pay particular attention" in promulgating the guidelines, *see* 28 U.S.C. § 994(f), it is nonetheless a general objective not specific to any particular guideline. The directive expressed by § 994(h), on the other hand, is a specific command aimed at a narrow class of defendants who are established as career criminals. In essence, § 994(h) is a specific exception, dealing with a narrow class of criminal offenders, that limits the discretion otherwise granted to the Commission to create sentencing guidelines. Therefore,

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[25] The point made here, that a comparison of § 994(h) with § 994(i) clearly evinces Congress's intent in enacting § 994(h) to narrow the Commission's discretion in sentencing career criminals, provides further support for my analysis in part I. In other words, it strikes me as quite odd to note, on the one hand, that Congress clearly directed the Commission to sentence career criminals at or near the maximum, while noting, on the other, that it gave the Commission complete discretion to define what that maximum is.

while the Commission should strive to harmonize the implementation of § 994(h) with other, more general, congressional directives, to the extent that § 994(h) is in tension with them, I believe that the more general directives must bend to accommodate the more specific § 994(h), rather than the other way around.

Third, I find the defendants' and the Commission's disparity arguments to be largely irrelevant in this context. One of the principal justifications cited by the Commission in promulgating Amendment 506 was the perceived need to eliminate the disparity resulting from the exercise of prosecutorial discretion in deciding whether or not to seek maximum penalty enhancements. *See* U.S.S.G.App. C, Amendment 506, at 409 (November 1994). A review of the legislative history, however, strongly suggests that the sentencing disparity that Congress hoped to eliminate did not stem from prosecutorial discretion, but, instead, from two other sources: (1) unchecked judicial discretion in formulating sentences, and (2) the imposition of indefinite sentences subject to parole board review. *See* S.Rep. 225 at 38, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221. More specifically, it is apparent that Congress was particularly concerned by the fact that different judges—due to differing views on the purposes and goals of punishment—tended to mete out substantially different sentences to similarly situated individuals convicted of the same crimes. S.Rep. 225 at 41-46, *reprinted in* 1984 U.S.C.C.A.N. at 3224-29.[26] It is not apparent, however,

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[26] Senator Kennedy argued that sentencing guidelines were necessary because "[f]ederal criminal sentencing is a national disgrace. Under current sentencing procedures, judges mete out an unjustifiably wide range of sentences to

that Congress was overly (or even marginally) concerned with disparities resulting from prosecutorial discretion over charging decisions. Indeed, one of the principal criticisms expressed against adopting the enabling legislation was that sentencing guidelines would simply shift the unchecked discretion in sentencing from judges to prosecutors. *See* S.Rep. 225 at 63, *reprinted in* 1984 U.S.C.C.A.N. at 3246. Congress could hardly have been seeking to reduce sentencing disparities arising from exercise of prosecutorial discretion when the legislation under consideration would, if anything, enhance that discretion. Hence, the unwarranted disparities that Congress intended the Commission to correct were those primarily arising from judicial, not prosecutorial, discretion.

Finally, as I have noted, § 994(h) specifically refers to the enhanced penalty statutes (*e.g.* 21 U.S.C. § 841) to which it applies. These statutes, in turn, expressly vest discretion in the prosecutor to seek application of the criminal history enhancements. *See* 21 U.S.C. § 851. Thus, it is reasonable to conclude that Congress understood that its command to sentence at or near the maximum term authorized could result in disparate sentences for similarly situated individuals depending on whether or not the prosecutor had chosen to seek the enhanced penalties provided by the underlying statutes. Thus, I think the disparities that result from an implementation of § 994(h)'s clear directive to sentence "at or near" the maximum are not the "unwarranted disparities" that Congress charged the Commission to avoid.

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offenders convicted of similar crimes." 129 Cong.Rec. 1644 (1984).

While I am sympathetic to the concerns noted by the Commission in promulgating Amendment 506, I nonetheless find it contrary to Congress's clear command. In sum, I believe the amendment is inconsistent with Congress's clearly expressed intent to limit narrowly the Commission's discretion to establish sentencing ranges for career offenders. Accordingly, I dissent with respect to parts I-IV.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CRIM. No. 92-69-P-H

UNITED STATES OF AMERICA

v.

GEORGE R. LABONTE, DEFENDANT

May 5, 1995

ORDER

HORNBY, District Judge.

This case involves a challenge to the legality of United States Sentencing Commission commentary to its sentencing guidelines. The Department of Justice, through the United States Attorney's office, maintains that the Commission has exceeded its powers. It therefore lies to court-appointed counsel for the defendant to seek to uphold the Commission's actions. Although I have the greatest respect for the professional competence and preparation of both lawyers, I believe that this is one instance where the adversary system has not adequately developed the legal issues. The Sentencing Commission—un-

represented here in court—is an independent commission within the judicial branch. 28 U.S.C. § 991(a); *Mistretta v. United States*, 488 U.S. 361, 361, 109 S.Ct. 647, 649, 102 L.Ed.2d 714 (1989). The United States Attorney's Office, on the other hand, is the prosecutorial arm of the executive branch. I am not satisfied that the prosecution lawyer, naturally seeking to uphold the sentence previously imposed, has fully explored with Commissioners and staff the full rationale and support for their commentary. The lawyer for the defendant, although forcefully advancing the merits of his client's case, is obviously not in a position to approach Commission headquarters and collect this information. Thus, this is one of those rare cases that cries out for a brief, independent of the Department of Justice, advancing the Commission's position. The Court of Appeals may wish to solicit an amicus brief or its equivalent, independently advancing the Commission's view, *see* 28 U.S.C. § 995(a)(23), before the Court of Appeals reaches a final decision.

In the meantime, however, I must rule. The United States Supreme Court has instructed us that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, — U.S. ——, ——, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993); *see United States v. Piper*, 35 F.3d 611, 617 (1st Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 1118, 130 L.Ed.2d 1082 (1995). I conclude that, although the case is not without difficulty, the commentary under attack is not plainly erroneous or inconsistent with the

guidelines, nor does it violate the Constitution or federal statutes. I therefore follow the commentary.

BACKGROUND

Applying Sentencing Commission Guidelines and Commentary as then in effect, I sentenced George Raymond LaBonte on June 24, 1993, to 188 months in prison, the minimum of the guideline range for "career offenders." United States Sentencing Commission, *Guidelines Manual*, § 4B1.1 (Nov. 1993). LaBonte was a "career offender" under section 4B1.1 because he had two previous felony drug offenses in addition to the drug offense for which I was sentencing him. Under the career offender guideline, the guideline range depends upon the "Offense Statutory Maximum." *Id.* Under the commentary applicable to section 4B1.1 when I sentenced LaBonte, I determined the Offense Statutory Maximum (and thus the guideline range) not by looking simply at the maximum penalty for the offense he committed, but by increasing it for LaBonte's previous drug convictions in accordance with 21 U.S.C. § 841(b).

As of November 1, 1994, however, the Commission revised[1] its position and changed the commentary to

[1] I say "revised" because that is the popular perception. Actually, the pre-amendment application note stated only that " 'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction." USSG § 4B1.1, comment. (n. 2). The courts consistently interpreted this to mean the maximum *after* enhancements. *See, e.g., United States v. Smith*, 984 F.2d 1084, 1086-87 (10th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C.Cir.1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir.1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir.1989). But whether the amendment is to a prior Commission position or to judicial interpretation of the Commission's position makes no difference to the analysis.

Guideline 4B1.1 to state clearly that in calculating a guideline sentence for a career offender, a court should consider only the statutory maximum penalty for the offense, *without* adding the statutory enhancement for past criminal history. USSG § 4B1.1, comment. (n. 2). It also made the change retroactive and therefore applicable to LaBonte. USSG § 1B1.10(c). The new interpretation lowers LaBonte's guideline range to 151 to 188 months. Although a sentencing court has the discretion whether to resentence under these circumstances, this is a case where—unlike *United States v. Piper*, No. 93-49-P-H (D.Me. Feb. 23, 1994) (declining to reduce the sentence),—I would clearly reduce the sentence to the minimum of the new sentencing range if that is within my power, and sentence LaBonte to 151 months for the reasons I set forth in sentencing him initially at the bottom of the previous guideline range.

LAW

The portion of the guideline enabling statute that provokes this controversy states that in a felony drug conviction:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants [who are at least 18 years old and have previously been convicted of two or more violent felonies or felony drug offenses].

28 U.S.C. § 994(h). The Commission has tried to implement this provision through section 4B1.1 for career offenders. For defendants who meet the

criteria of section 994(h), the Commission has created a table that assigns a particular offense level to various "Offense Statutory Maximums," a term coined by the Commission. USSG § 4B1.1. Initially, the Commission defined this phrase in the commentary, application note 2, as "the maximum term of imprisonment authorized for the offense of conviction." *Id.* at comment. (n. 2.) (Nov. 1993). Courts interpreted this to mean the maximum penalty as enlarged by any enhancements available for certain defendants—such as the increased penalties the drug sentencing statute provides if the defendant has one or more qualifying prior drug convictions. 21 U.S.C. § 841(b). *See, e.g., United States v. Smith*, 984 F.2d 1084, 1086-87 (10th Cir.), *cert. denied*, — U.S. ——, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C.Cir.1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir.1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir.1989).

In adopting its 1994 interpretation, the Commission amended the definition of its phrase "Offense Statutory Maximum," by specifically excluding "any increase in [the] maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record. . . ." USSG § 4B1.1, comment. (n. 2). The Commission reasoned:

> This rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions.

Amendment 506, U.S.S.G.App. C, at 409 (Nov. 1994).

The Government, seeking to uphold the previously harsher sentences, argues that the revised commentary is invalid because it "expressly disregards the enhanced penalty that 21 U.S.C. § 841(b)(1)(C) provides for second-time drug offenders and is inconsistent with congressional intent as expressed in 28 U.S.C. § 994(h)." Government Objection to Mot. for Reduction of Sentence at 9-10. The Government focuses on the fact that the new commentary reduces the sentences some repeat drug offenders will serve and finds this result contrary to Congress's desire for sentencing "at or near the maximum."

There are two significant difficulties with the Government's approach. First, it assesses the legitimacy of a revision only by comparing it to the previous position, rather than evaluating the overall guideline structure as amended. By focusing exclusively on Congress's desire for maximum punishments and the previous interpretation that required harsher sentences, the argument seems to imply that any Commission change that might result in lighter punishment in this area is perforce illegal. Second, it looks at only one of the mandates assigned to the Commission—that of harsh punishment—and totally ignores others, such as the directive to reduce sentencing disparity.[2] I will elaborate on the second difficulty.

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[2] The Commission is also charged in constructing its guidelines to minimize the likelihood of the federal prison population exceeding prison capacity and to take criminal history into account in sentences "only to the extent [it has] relevance" to the sentencing policies. 28 U.S.C. §§ 994(g), (d)(10). Moreover, Congress specifically directed the Commission to "periodically . . . review and revise [its guidelines], in con-

If the sole measure of the guidelines is how well they carry out a congressional mandate to be severe, then the career offender guideline fails the test even without the recent revision to commentary. The sentences resulting from the table in section 4B1.1, after allowing for reduction for acceptance of responsibility, generally achieve only 63% to 78% of the enhanced penalty.[3] Thus, under the Government's argument that in 28 U.S.C. § 994(h) Congress intended the Commission to ensure sentences literally "at or near" the maximum of the enhanced penalty, the Guidelines are defective, regardless of the new commentary. But harshness, of course, is *not* the sole measure of the guidelines. Congress has also charged the Commission to establish policies "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Indeed, Congress has emphasized its directive to avoid disparities, calling for "particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f). In adopting its 1994 interpretation of section 4B1.1, the Commission specifically noted that United States Attorney charging practices had created unwarranted sentencing disparities in the application of the career of-

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sideration of comments and data coming to its attention." 28 U.S.C. § 994(o).

[3] For 25-year sentences, for example, the offense level is 34. Acceptance of responsibility, USSG § 3E1.1, could reduce that to 31 and with the automatic criminal history category of VI, yield a guideline range of 188 to 235 months compared to the statutory maximum of 300 months.

fender guidelines and advanced the interpretation as a means to end those disparities. *See* Amendment 506, U.S.S.G.App. C, at 408-09 (Nov. 1994). According to the Commission's authorizing statute, that is a legitimate and important objective. *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f). Yet the case as currently presented to me does not explore the seriousness of those disparities (although every sitting sentencing judge is aware that they exist) or the extent to which the directive to avoid such disparities provides support for the Commission's interpretation.

There is an alternative to the Government's reading of section 994(h) that interprets the section within the context of the entire guidelines statute and sentencing structure. First, it is important to observe that section 994(h) places responsibility for its implementation with the Commission and there was a reason for doing so. Originally, Senator Kennedy had sponsored legislation that would have mandated the *sentencing judge* to impose a sentence at or near the statutory maximum. 128 Cong.Rec. 26,511-12, 26,515, 26,517-18 (1982). The Senate Committee on the Judiciary replaced this proposal with section 994(h), believing "that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S.Rep. No. 225, 98th Cong., 1st Sess. 175 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3358. Thus, the goal of section 994(h) was for the Commission to achieve a "*consistent and rational* implementation" and to impose "*substantial* prison terms." *Id.* (emphasis supplied).

Second, the Government argues that the congressional directive to the Commission to "assure" certain sentences at or near the maximum must mean at or near the maximum of *enhanced* sentences. But in actuality that is a goal wholly beyond the Commission's powers. The availability of enhanced sentences lies exclusively within the prosecution's domain; no sentence enhancement is even available unless the United States Attorney chooses to file, before the defendant's trial or guilty plea, an information listing the previous convictions. 21 U.S.C. § 851(a)(1). The Probation Office can gather and report to the sentencing judge as many previous convictions as it wishes in the Presentence Report, but none of them will enhance the statutory maximum unless the Government has filed the information before the trial or guilty plea. It is obviously the variations in prosecution practice on this subject—whether from variation in diligence, plea bargaining procedure, or other causes—to which the Commission referred when it spoke of "unwarranted disparity." The Commission can only "assure" sentences at or near the maximum penalty for the *offense as committed*, without enhancements.

Thus, to make sense of Congress's mandate, the Commission seems correct in redirecting the focus to the penalty for the offense of conviction without enhancement. The Commission *can* develop guideline policies to assure sentences at or near *that* maximum. Likewise, reflecting the legislative history in the Senate Judiciary Committee Report, it can then assure a "consistent and rational" approach, something it cannot do as long as the sentences are

measured by enhancements that remain within the uncontrolled discretion of the prosecutor.[4]

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[4] On the other hand, I am not persuaded by the Commission's suggestion that the new rule "avoids unwarranted double counting" because the guideline as previously interpreted did not result in "unwarranted double counting." The so-called double counting could come from two possible circumstances: first, the increase statutorily recognized in 21 U.S.C. § 841(b)(1) coupled with the 28 U.S.C. § 994(h) instruction to sentence at or near the maximum; or alternatively the assignment of Criminal History Category VI because a defendant is a career offender with a particular criminal history and, on top of that, a total offense level adjusted upward because of the enhanced statutory penalty. Neither of these is unwarranted double counting, however. The first is simply Congress's direction of what sentences it wants. If the Government's argument concerning Congress's intent in 28 U.S.C. § 994(h) is correct and if it overwhelms all other directives to the Commission, then there is no double counting as such. Likewise, there is no double counting in the automatic assignment of the highest criminal history category and an increase for the total offense level, because the whole exercise is simply designed to yield, by formula, a sentence that will be at or near the maximum of something, and the only question is what that "something" should be.

In making its revision, the Commission also observed:

> It is noted that when the instruction to the Commission that underlies § 4B1.1 (28 U.S.C. § 994(h)) was enacted by the Congress in 1984, the enhanced maximum sentences provided for recidivist drug offenders (*e.g.*, under 21 U.S.C. § 841) did not exist.

Amendment 506, U.S.S.G.App. C, at 409 (Nov. 1994). This statement is clearly wrong. Enhancements already existed under the drug statutes for repeat offenders. The exact amounts of the enhancements may have changed, but the concept was well in place when section 994(h) was enacted, and had been since at least 1970. *See* Comprehensive Drug Abuse

Finally, this reading also permits the Commission to consider the other objectives the sentencing statute charges it with—reducing sentencing disparity, minimizing excess prison populations, avoiding excessive weight on criminal history—rather

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Prevention and Control Act of 1970, Pub.L. No. 91-513, 1970 U.S.C.C.A.N. (84 Stat.) 1437, 1466-68.

Are these two errors enough to invalidate the revised commentary? I think not, albeit with some reservations. The revision can stand for two reasons: on the other basis enunciated by the Commission and because it is more consistent with the overall guideline sentencing structure. The incorrect reference seems to be only a (misdirected) observation in passing. It seems inappropriate, if not unfair, to deny the benefit of the revision to defendants merely because of careless research by Commission staff.

These two errors make me characterize this case as "not without difficulty." Nevertheless, I believe the text and legislative history of section 994(h) along with the other goals the Commission is directed to pursue in section 994 are sufficient to support the 1994 commentary against the Government's attack.

After drafting this opinion, I learned that the Commission on May 1, 1995, has submitted to Congress a new amendment to the section 4B1.1 commentary. The amended commentary maintains the same position substantively, but explains the Commission's rationale as follows: more precise focus on the class of recidivists for whom lengthy imprisonment is appropriate; avoidance of "unwarranted sentencing disparities"; and "consistent and rational implementation" of both the overall guidelines scheme and the specific directive to assure substantial prison terms for repeat drug and violent offenders. Amendment Notice, 60 Fed.Reg. 14,054 (1995).

By placing this explanation in the commentary to section 4B1.1, the Commission apparently has abandoned the faulty rationales it provided in the text of Amendment 506, which I have criticized above. *See* Amendment 506, U.S.S.G.App. C, at 409 (Nov.1994).

than having to treat one factor, substantial punishment, as the only matter of concern.

It is true that several courts adopted the earlier interpretation. *See, e.g., United States v. Smith*, 984 F.2d 1084, 1086-87 (10th Cir.), *cert. denied*, — U.S. — —, 114 S.Ct. 204, 126 L.Ed.2d 161 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C.Cir.1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir.1991); *United States v. Sanchez-Lopez*, 879 F.2d 541, 558-60 (9th Cir.1989). *Stinson* teaches us, however, that "prior judicial constructions of a particular guideline cannot prevent the Sentencing Commission from adopting a conflicting interpretation," — U.S. at ——, 113 S.Ct. at 1914,—this in ruling upon an earlier Commission amendment of the commentary to the same career offender guideline. The United States Supreme Court has specifically approved commentary amendment as an appropriate way for the Commission to revise the guidelines "if the guideline which the commentary interprets will bear the construction."[5] On the arguments presented to date, I conclude that section 4B1.1's "Offense Statutory Maximum" terminology will bear the Commission's new definition and, for the reasons I have discussed, it seems to be one reasonable way for the Commission to carry out divergent congressional directives.

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[5] *Id.* at ——, 113 S.Ct. at 1919. "Amended commentary is binding on the federal courts even though it is not reviewed by Congress." *Id.* Interestingly, the commentary amendment in this case was actually submitted to Congress, *see* 50 Fed.Reg. 23,608 (1994), although I draw no inference from Congress's failure to take action on it.

Accordingly, I follow the revised commentary and reduce LaBonte's sentence to 151 months.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal No. 92-40-P-C
(Civil No. 94-305-P-C)

UNITED STATES OF AMERICA

v.

STEPHEN DYER, DEFENDANT/PETITIONER

[Filed Feb. 22, 1995]

ORDER DISMISSING MOTION TO VACATE SENTENCE

Petitioner herein, filed on October 14, 1994, a Motion to Vacate and Set Aside Sentence pursuant to 28 United States Code section 2255. Among the various allegations made therein is that trial counsel provided constitutionally defective advice by promising to Petitioner that his Base Offense Level would be Level 6, that he would not be adjudicated a Career Offender, and that he would receive a "very lenient" sentence. Petitioner also asserts that trial counsel unreasonably failed to object to an adjudication as a Career Offender or to argue that predicate offenses for that determination did not qualify as crimes of violence or as drug offenses. It is also asserted that counsel

failed to challenge certain facts which are not specified in the Presentence Report and failed to seek a downward departure based on Petitioner's physical condition, cooperation with authorities or because Petitioner's record of prior convictions over-represented the seriousness of his criminal history. Petitioner asserts that the Career Offender guideline is unconstitutional. He also asserts that he desired to withdraw his plea of guilty, but that trial counsel informed him that he could not do so.

The petition also alleges that Petitioner's failure to appear for sentencing should not have been used to enhance his Guidelines sentence and that counsel failed to explain his conduct in failing to appear to the sentencing court at the time of imposition of sentence. Petitioner also asserts that the Government breached the Plea Agreement by declining to file a motion for downward departure pursuant to Guideline section 5Kl.1. He also asserts that his guilty plea was invalid because he was under the influence of medication at the time it was tendered. Petitioner further alleges that he was entitled to an adjustment for acceptance of responsibility.

Petitioner presents no sworn affidavit to support any of his claims in this matter. He argues simply in a memorandum (Docket No. 46) that he is entitled to relief under section 2255 because of a variety of flaws, as set forth above, in the Guidelines sentencing process and in the performance of his trial counsel. Even construing Petitioner's *pro se* memorandum liberally, as the Court is required to do, and accepting as true each of the factual allegations set forth in the memorandum, Petitioner has failed to allege any facts on which it may be concluded that his sentences were imposed in violation of the Constitution or laws of the

United States, or that the Court was without jurisdiction to impose such sentences, or that the sentences were in excess of the maximum authorized by law, or are otherwise subject to collateral attack . .", the sole grounds upon which a prisoner in custody under sentence of a federal court may move the court which imposed the sentence to vacate, set aside, or correct the sentence under 28 United States Code section 2255.

The record in this case conclusively demonstrates that Petitioner is not entitled to relief as sought. *See* Rule 4(b) of the Rules Governing Section 2255 Proceedings, 28 U.S.C. fol. § 2255.

Accordingly, it is hereby ORDERED that Petitioner's Motion to Vacate Sentence be, and it is hereby, DENIED.

/s/ GENE CARTER
GENE CARTER
Chief Judge

Dated at Portland, Maine this 22nd day of February, 1995.

OFFICE OF THE CLERK
United States District Court
DISTRICT OF MAINE

WILLIAM S. BROWNELL
Clerk

U.S. District Court
One City Center
Portland, Maine 04101
Tel. (207) 780-3356

March 6, 1995

TO: ALL COUNSEL OF RECORD

RE: USA v. STEPHEN DYER
CRIMINAL NO. 92-40-P-C

Dear Counsel:

Please be advised of the following endorsement made this date by Chief Judge Carter upon the Defendant's Motion to Clarify Order:

The Court's reason was that it relied on in United States v. Hunnewell, Crim. No. 92-70-P-C (Jan. 10, 1995).

Sincerely,

/s/ SUSAN L. HALL
SUSAN L. HALL
Deputy Clerk

cc: Margaret D. McGaughey, AUSA
Neale A. Duffett, Esq.
Stephen Dyer, Esq.
U.S. Probation Office

APPENDIX D

OFFICE OF THE CLERK
United States District Court
DISTRICT OF MAINE

WILLIAM S. BROWNELL
Clerk

U.S. District Court
One City Center
Portland, Maine 04101
Tel. (207) 780-3356

January 11, 1995

TO: ALL COUNSEL OF RECORD

RE: USA v. ALFRED L. HUNNEWELL
CRIM. 92-70-P-C

Dear Counsel:

Please be advised of the following endorsement made January 10, 1995 by Chief Judge Carter upon the Defendant's Motion for Reconsideration of Sentencing:

> After full review of the Government's written submission hereon (the defendant having failed to comply with Local Rule 19), the within notice is hereby DENIED, the Court CONCLUDING that Application Note 2 is invalid as in contravention of 21 U.S.C. § 841(b)(1)(C) and 28 U.S.C. § 994(h). So ORDERED.

Please be advised that the Government's Motion Under Rule 19 to File Response in Excess of Twenty Pages was granted by Chief Judge Carter on January 10, 1995.

Enclosed please find a copy of the Judgment issued this date upon the Defendant's Motion for Reconsideration. Please note that the Judgment and the above-referenced endorsements were this date entered upon the docket in this matter.

Sincerely,

/s/ SUSAN L. HALL
SUSAN L. HALL
Deputy Clerk

Enc.

cc: Margaret D. McGaughey, AUSA
Neale A. Duffett, Esq.
U.S. Probation Office

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Criminal Action No. 93-49-P-H

UNITED STATES OF AMERICA

v.

DAVID PIPER, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for Motion Hearing before the HON. D. BROCK HORNBY, in the United States District Court, Portland, Maine, on the 14th day of February, 1995, at 4:05 p.m.

APPEARANCES:

For the Government:	Margaret McGaughey, Esq.
For the Defendant:	Peter Clifford, Esq.
Also present:	Robert Napolitano, Esq.

Cindy Packard-Robitaille, RPR, RMR
Official Court Reporter

Proceedings recorded by mechanical stenography, transcript produced by computer.

[1]

[2]
(At 4:05 p.m., counsel present in open court, following proceedings transpired.)

THE COURT: Good afternoon, counsel. I just asked the clerk to get Attorney Napolitano to sit in since the two cases are similar. I understand there may be some question about his representation, but I'd like at least to have him here so we don't have to repeat the legal arguments. We'll just wait until he arrives.

Good afternoon, Mr. Napolitano. These two cases that I'm about to hear both involve the same guideline issue so I wanted to have you present, but I also understand from some correspondence from the clerk's office that there's some question as to your representation of Mr. Labonte, maybe we should straighten that out first. What is your status?

MR. NAPOLITANO: My understanding, Your Honor, is that I haven't talked to Mr. Labonte since June of '93. Diane Powers did his appeal, and I think according to the dockets that he filed his own motion for reduction back in March of '94, which was denied. I know the court would have no way of knowing the Court of Appeals, Diane Powers had worked for them.

He called me yesterday, Mr. Labonte, in response to a letter I sent him last week telling him this matter was coming up, and I think he feels since she did the appeal, she would have more knowledge of this, but in any event, I'm [3] prepared to argue it. I'm here.

THE COURT: Excuse me, you talked to Mr. Labonte yesterday?

MR NAPOLITANO: Called me collect.

THE COURT: He indicated to you Ms. Powers would be—

MR. NAPOLITANO: She had done his appeal, I said if you want her to do it, I'll tell the court. He said no, you know, sort of undecided what he wanted, that's the reason I brought it to your attention of Your Honor this morning. My understanding was as a result sometime after November 1st you had called the clerk's office sometime in December and told me about these two cases, Hunnewell and Labonte, and at that time on December 21, I think I filed a motion for reduction of sentence. I didn't anticipate obviously all these problems would come up, I didn't even know about Diane Powers at the time.

THE COURT: I understand.

MR. NAPOLITANO: That's the status.

THE COURT: So the record is clear, I think there was a memo from the probation office that probably went to government counsel and counsel for the defendants when the amendment to the guidelines went into effect listing the cases in this district that could be affected, and then I think probably I asked the clerk's office or probation in any [4] case where there hadn't been a motion filed to inquire of counsel whether there would be a motion probably—

MR. NAPOLITANO: That's what I did, I filed on December 21. Then in light of last week, the Judge Carter's decision in Hunnewell, the case I sent to Your Honor a letter indicating my understanding was from Mr. Duffett, they were going to appeal that, maybe to withdraw that. You said no, you didn't want that to happen, to show up today, that's why I'm here.

THE COURT: I don't have any opinion as to what happened with Judge Carter, I didn't want you to withdraw, that's right, in terms of the hearing for today.

MR. NAPOLITANO: Sure.

THE COURT: Why don't you be seated and we'll proceed through with the hearing and then see where to go from there. The situation is that we're talking about two cases, United States v. Piper, which was Criminal Number 93-49-P-H, in which Mr. Clifford is defense counsel, and Ms. McGaughey is representing the government; and United States v. George Labonte, Criminal Number 92-69-P-H, in which Ms. McGaughey is again representing the government. And we've just heard the status of Attorney Napolitano and the somewhat uncertainty of his representation.

And the procedural history, I guess as has been summarized, let me reiterate it, the probation office brought [5] to the attention of the Judges in this district the cases that could be affected by the retroactivity of the guideline Amendment Number 506, and these two cases could be affected by applying retroactively Amendment Number 506. And the Commission has indicated that it is one of the amendments that can be applied retroactively.

Since the motions were filed and briefed, and briefed most recently I guess by the government, I have been made aware of an endorsement by Judge Carter in United States v. Alfred Hunnewell, Criminal Number 92-70-P-C, on a defense motion for reconsideration of sentencing, in which Judge Carter's endorsement was as follows, quote, after full review of the government's written submission hereon, the defendant having failed to comply with Local Rule 19, the within motion is hereby denied, the court concluding that Application Note 2 is invalid as in contravention of 21 USC, Section 841(b)(1)(C), and 28 USC, Section 994(h). So ordered.

Now just to make a couple of comments concerning the significance of that endorsement for these cases, first of all, the law is clear that there's no binding precedential effect from a decision by one Judge of a district on another Judge, but by the same token, it is the effort certainly of the Judges in this district to endeavor to maintain consistency in the application of the law so that Judge shopping is discouraged and so that parties do not find [6] capriciousness in justice that depends upon which Judge is deciding a case.

That's one set of considerations. Another set is that without knowing anything more about the Hunnewell case than what I've just read to you, it appears that there was some defect in the defendant's submission. Local Rule 19 of course all counsel know is the rule that deals with the submission, timely submission of memoranda in connection with a motion, and I'm sure, perhaps Ms. McGaughey will enlighten us later, but it may be that the defense motion there did not have a legal argument that was presented to Judge Carter, and that's another consideration to take into account here.

Third is that part of the government's argument, not all of it, but part of it is that the amendment to the guideline commentary in Amendment 506 is invalid as contrary to statute which of course is a severe conclusion in terms of the Commission's role within the guideline sentencing where the United States Supreme Court has instructed us in *Stinson* that ordinarily, commentary should be considered binding on the courts so long as it is consistent with the statute or that it is simply interpretation of an ambiguous provision. And I say all of that simply to indicate that clearly I want to be sure that we get it right in terms of what we do.

I've been informed by the probation officer, Mr. Wahrer, [7] that he is informed that the Hunnewell case has had a notice of appeal filed, again Ms. McGaughey can probably confirm in a moment whether that's so or not in terms of its status. And with all of that, I have one preliminary question for Ms. McGaughey, which I don't mean to be impertinent, I'm sure you will understand in a moment, that is simply with respect to your authority here where the Commission guidelines being challenged, is this a challenge that's a policy within the district, or is this something that's been authorized at a higher level. I ask that simply because of the significance of the Commission guidelines and their implication.

MS. MCGAUGHEY: Would you like me to begin answering your questions?

THE COURT: Would you, please, yes.

MS. MCGAUGHEY: If I can remember them and answer them in reverse order. First question, is this a nationwide challenge or is this a challenge that is limited to the district, we have been instructed by the Department of Justice to challenge this on a nationwide basis. My understanding from the Department of Justice sources is that the first of these cases to reach a litigation posture are the now I believe eight cases in the District of Maine. We are the first ones out of the shoot [*sic*], but this is not a maverick decision by the United States Attorney in the District of Maine.

[8]

Second, if I understood your question, it was to inquire of the status of the Hunnewell appeal, I can't answer that question. I am representing the government in all of these cases.

THE COURT: All being eight in Maine.

MS. MCGAUGHEY: All of the eight in Maine. Mr. Hunnewell's was the first to be decided by Judge Carter as you've correctly pointed out. A notice of appeal has been filed in that case, it has been docketed, and an original briefing schedule was set for March 3rd, 1995. However, in the interim, Neale Duffett who was the Maine attorney who represented Mr. Hunnewell moved to withdraw, that motion was granted, and an attorney from Boston has entered an appearance in the case. I have not yet been notified as to whether that will change the briefing schedule or not. Certainly the government within the realms of reason will endeavor to move these, move that case as expeditiously as it can, both for the consequences in the District of Maine and for the consequences nationwide in terms of its precedential value.

THE COURT: Tell me again the schedule that was in effect.

MS. MCGAUGHEY: It was in effect that the defendant's brief was due on March 3rd, the government would have had 28 days to respond. I can represent as an officer [9] of the court that that would not have been required, that our turnaround time would have been substantially faster. Had the case proceeded in the ordinary course, it would have been possible for the case to have been on the May list for oral argument. I don't know one way or another whether that will occur because I don't know whether new counsel for Hunnewell will move for an extension or not.

THE COURT: While we're on Hunnewell, is the issue clean in Hunnewell, or it is complicated by the Rule 19, Local Rule 19 issue?

MS. MCGAUGHEY: At the risk of sounding impertinent to the court, I would rather not take a position on the Rule 19 issue. I can, however, represent to you as the attorney who has handled all of these cases that the issues on the merits with respect to the invalidity of the new application note are consistent in all of the cases, that with the exception of I believe two sentences, which I discovered in Mr. Piper's case, it's almost verbatim. However, I would also point out to the court—

THE COURT: I'm sorry, what's verbatim?

MS. MCGAUGHEY: The legal argument with respect to the invalidity of the new application note is almost verbatim in each of those cases, I know that because I wrote it in all of them.

THE COURT: My question is this simply, can we be [10] reasonably confident that the First Circuit will decide on the merits the validity of the amendment, I know you can't be completely confident, that's what I meant by a clean case as to whether that issue is sufficiently focused that we're likely to get a decision on it.

MS. MCGAUGHEY: Well, as Your Honor knows from having periodically sat as a member of the First Circuit, an appellate court is required to examine the case as a whole and if a court below reaches the right result for the wrong reason, the appellate court not only has the right, it has the duty to examine the alternative grounds. So to that extent, is the issue with respect to the invalidity of the new application note squarely presented, yes, it is, because Judge Carter's opinion in the government's view if it doesn't incorporate by reference the arguments that the government made, it certainly provides a basis for the appellate court to conclude that the government's

arguments may have entered into Judge Carter's thinking on the merits.

THE COURT: All right.

MS. MCGAUGHEY: If I may make one more comment.

THE COURT: Yes.

MS. MCGAUGHEY: And that's simply to point out to the court that in Mr. Labonte's case and Mr. Piper's case, the government has made alternative arguments.

THE COURT: Right.

[11]

MS. MCGAUGHEY: And in each of those, one is the pure legal issue of whether the application note is invalid, but the second is the fact bound specific argument with respect to this court choosing to exercise or not exercise its discretion under the statute to revisit the sentence assuming that the guideline application note applies.

THE COURT: Thank you, Ms. McGaughey. That very helpful, and it puts I think these cases in this posture. On the one hand, both of these defendants are under sentences that have a long way to go and there is no particular urgency to a resolution of the matter before us today, it won't affect their release within the reasonably foreseeable future. And so on the one hand, a decision by the First Circuit in Hunnewell if it dealt with the merits could in fact resolve both cases if it came down in the government's favor. If it came down against the government, then we would have the issue still presented.

I think the alternative that Ms. McGaughey has just referred to is that the government in each of these cases is arguing to me that even if the guideline

amendment is valid that there are other reasons why I should remain with the sentence originally imposed. I suppose we could go forward on that issue in each case and reach a resolution, and I suppose the possibilities are that I would agree with the government in both cases, which could then end these cases regardless [12] of the outcome of Hunnewell, assuming that I made a decision that was otherwise appropriate.

Alternatively, I might disagree with the government in both cases, and in that event, the Hunnewell decision would again become material. Or still again, I might agree with the government in one case and not in the other, in which case we'd have one that would be done and one that would be ongoing.

So let me inquire of all three of you what your advice to me is in terms of the most efficient and expeditious way of proceeding. Is it to let these matters simply stay in abeyance while we wait for a decision from the circuit on Hunnewell, is it to move forward and hold argument and to deal with the nonvalidity issues or what, and let me hear from defense counsel first, I'll come back to Ms. McGaughey. Mr. Clifford.

MR. CLIFFORD: Your Honor, with respect to Mr. Piper, there is another important factor, that's there is a petition for certiorari which is still pending.

THE COURT: I'm glad you raised it. Do I even have jurisdiction to hear your motion?

MR. CLIFFORD: I think you do, Your Honor, the primary reason that I filed the motion was of course I wanted to make sure that I presented it and didn't waive it. At the same time, I'm still optimistic the certiorari petition may [13] be granted although I have to acknowledge that all of the other cases have

been denied, and I don't have very high hopes for the petition. So I expect as a practical matter that it will be denied, although of course it's still pending. I called the court this afternoon right before I came here, and according to the computer system there it's still pending.

THE COURT: But you maintain that while the petition is there, there's nevertheless jurisdiction in this court. I've not had to deal with this for a long time, I've forgotten the answer to that.

MR. CLIFFORD: Your Honor, because I suppose I'm not prepared to answer that question—

THE COURT: All right. We'll hear from Ms. McGaughey.

MR. CLIFFORD: —in any detailed sense, I certainly would defer to the government on that point, but I think that in order to avoid a waiver of the issue, I felt that I needed to file.

THE COURT: I don't challenge what you did, I'm only asking what I should do. Where does all of that lead you?

MR. CLIFFORD: I suppose the court would be required to keep this particular matter in abeyance until the petition is decided because certainly if the petition is [14] granted and assuming that Piper wins his appeal on the career offender issue, all of this would be an academic exercise with respect to him. But all those possibilities are uncertain by any stretch.

THE COURT: So do I gather your overall suggestion is you would just as soon wait a while to see what happens at least on the petition for certiorari and possibly on the Hunnewell outcome?

MR. CLIFFORD: Your Honor, I would wait with respect to the certiorari, but I would be prepared to

argue it today and maybe to watch what the other decisions are, but I've prepared the argument, I feel able to argue it, and I think the court could keep its decision on hold until the certiorari. And I would certainly notify the court as soon as that came out, that would be the most efficient course. I don't see any need to come back here and reargue it all over again.

THE COURT: Is your argument on validity or is it on the appropriateness of Mr. Piper for relief.

MR. CLIFFORD: It's on both grounds, Your Honor.

THE COURT: The validity may be something where we're all wasting our time if the First Circuit logically is going to get to decide that in Hunnewell first because then what I say will be irrelevant if once Hunnewell comes down, that will be law of the circuit.

[15]

MR. CLIFFORD: If the Hunnewell decision was decided without the procedural problem, I would totally agree with the court. But I'm a little nervous that the Rule 19 deficiency might create a decision in which there's a procedural problem and the appeal is denied on that basis, and therefore, the merits wouldn't have been reached. And I agree that it's—there's a lot of different cases to consider, I'm not sure how the other cases are going, but I would prefer to discuss the legal issues today if possible.

THE COURT: All right. Mr. Napolitano, I'm probably way beyond your authority, but where are you with Mr. Labonte.

MR. NAPOLITANO: I said in my letter last week, Your Honor, I think it would be prudent to wait until the Circuit Court of Appeals, I think they're going to

decide the case on the merits, have nothing to do with Local Rule 19.

THE COURT: Thank you. Ms. McGaughey.

MS. MCGAUGHEY: Your Honor —

THE COURT: Also like to hear you on the certiorari question.

MS. MCGAUGHEY: It baffles me, however, having looked at FRAP 41, which deals with the issuance and stay of mandate after an appellate opinion, my cursory reading of Rule 41(b) indicates to me that mandate, that is the ability of this court to resume jurisdiction does not automatically [16] stay when a petition for writ of certiorari is filed, but only is stayed when there is a motion, reasonable notice to the parties. I confess my ignorance of not knowing, I believe mandate has issued after the direct appeal of Mr. Piper's conviction, but I don't know.

THE COURT: Well, hang on, I think I can tell that from the file. Yes, we received the mandate October 6 of '94. So the mandate issued, which would at least initially put jurisdiction back in this court, and I guess what you're saying makes some sense that at this stage then, what Mr. Clifford has is a petition for certiorari which doesn't vacate the mandate until the petition is granted, or until some stay is otherwise entered, is that what you're suggesting?

MS. MCGAUGHEY: I am suggesting that in part based on the difference between an appeal as of right to the First Circuit and a petition for writ of certiorari to the Supreme Court, whereas the former is a matter of right, the latter is a matter of discretion. And I'd be happy to research it for the court, but my instincts tell me that mandate having issued, and not been stayed, and cert. being a discretionary remedy

that jurisdiction does lie in this court to consider the case on the merits.

THE COURT: All right. And what is your position in terms of the prudent way to proceed in light of all the [17] various uncertainties?

MS. MCGAUGHEY: Well, Your Honor, there are I think arguments to be made on either side. I think in going to what I consider to be one of the human interest issues, I think there may be a penological interest in having the court decide the issue now. Hope springs eternal, each of these defendants may labor under the illusion that their chances for a sentence reduction hinge on what happens in the Hunnewell case. That does not dispense with the arguments that I have made with respect to each of these defendants that regardless of whether the amendment is valid or not valid that the sentences originally imposed on these defendants should stand.

I can see an argument for waiting, the problem with that is that if there is an extension in the Hunnewell case, these cases will be on hold for at least six months. And question of whether this court would rather forge ahead and make its own decisions or whether it would prefer to await the outcome of the First Circuit, I'm going to be here in any event, I'm going to be handling the appeals in any event.

THE COURT: What she's offering is to you, Mr. Clifford, a chance to take the appeal instead of Mr. Duffett's.

MR. CLIFFORD: Frightening, based on my experience with the First Circuit, I'm not sure I have any interest [18] in that. Your Honor, I guess I would amend my earlier remarks to the extent that the court does have jurisdiction, it would seem to me that—that it could actually render a decision in this

matter, and on the assumption that the certiorari basically is discretionary and that jurisdiction exists here.

THE COURT: Let me hear your argument, you're here, Ms. McGaughey is here, let me hear your argument and then we'll figure out what to do with Mr. Labonte in a moment.

MR. CLIFFORD: Your Honor, I note that the court mentioned the applicability of *Stinson* earlier, and I think it's clear that *Stinson* is the governing case, and in many respects, procedurally, it's remarkably similar to this case. In *Stinson*, the issue was the applicability of an amendment, Amendment 433, which stated in essence that possession of a firearm is not a crime of violence for career offender purposes. And the Court of Appeals in that case as well as the District Court concluded that for a variety of reasons, primarily because the guideline commentary was without effect, that Amendment 433 was irrelevant and that it wouldn't mandate a resentencing.

The United States Supreme Court was quite explicit in that case in delineating the deference that is to be accorded to the Commission. It went out of its way to, seemed to me to lecture to the courts that it really—that really second guessing of the Commission should not occur. In the absence [19] of what the Supreme Court described as a violation of statute, not even an inconsistency, it went I think a little higher and stronger by saying that the court must find in order to vacate the Commission's commentary that there's been a violation of statute, which brings us to the two statutes which the government has been arguing.

The first one, Section 841(1)(b)(1), in essence states that for a person of Mr. Piper's position who has multiple convictions for drug trafficking, that the range shall be from 10 to life. Assuming that the government's position is correct, that that is—that is the maximum, that 841 wouldn't apply, there's no inconsistency with the resentencing proposed by the Commission, as long as the guideline sentence is at least 10 years, which it is and that's undisputed, there's certainly no inconsistency with Section 841.

And the government I think very cleverly argues that as a matter of law, the maximum sentence allowed according to some precedence [*sic*] which predate *Stinson* is that the maximum allowed by statute including a statute which looks at prior offenses, but I think that critical structure that the government relies on should not be relied on by the court.

First of all, it predates *Stinson*, all four cases cited by the government were decided before *Stinson*. Those cases are the *Smith* case, which is at 985 F.2d, the *Garrett* case [20] which is at 959 F.2d, and the *Amis* case, and the *Sanches-Lopez* case. All of those cases according to the government suggest that the maximum term authorized as a matter of law, and despite the Commission's pronouncements afterwards, require the court to find that the maximum in this case is life and that's the benchmark which should be used for guideline purposes. All of those cases should be irrelevant in the wake of *Stinson* and in the wake of Amendment 506.

So really what we're left with is an analysis of Section 994(h) under Title 28, which is of course the statute which was at issue in Piper's direct appeal. I don't think it can be argued in any sense that Amendment 506 is inconsistent with section—statute,

Section 994, Section (h). First of all, the conspiracy offense is not even referenced in any way, shape, or form in Section 994. And again, the—at most what we see are relatively vague and ambiguous references to maximum term, it doesn't even say authorized by statute. And it doesn't say, it certainly doesn't reference 841(b)(1)(B).

And so quite simply, because there's no inconsistency with either the 21 USC 841 or 28 USC 994(h), I don't think the government's position is very solid.

THE COURT: Well, a maximum term if you have the previous convictions is higher.

MR. CLIFFORD: Your Honor, the maximum term is [21] actually defined by the Commission, and again, according to *Stinson*, since if there's any remote possibility that that phrase can be interpreted in any number of ways—

THE COURT: What's the ambiguity in the phrase, at or near the maximum term authorized?

MR. CLIFFORD: The ambiguity would be pointed out by the text of the commentary itself where—in which it claims that offense statutory maximum, again, this is Application Note 2 as it's been amended, I'm going to go to Amendment 506 because I don't think the new language is actually in the text. And the Commission's interpretation of that language is certainly rational and certainly entitled to great weight, and I think—

THE COURT: What 506 explanation that didn't end up in the commentary says is that the amendment defines the term offense statutory maximum to mean the statutory maximum prior to any enhancement based on prior criminal record. Now the reason given for that interpretation is one, to avoid unwarranted double counting; two, unwarranted disparity that

results from variations in the exercise of prosecutorial discretion. And then there's a third argument, that when the instruction underlying 4B1 was enacted, according to the Commission, the enhanced maximum sentences for recidivist drug offenders didn't exist. The government has said that's untrue, but that's the arguments that were made.

[22]

But I see all of those, I guess I come back to my first question which is what is ambiguous in the 994(h) phrase, the maximum term authorized. Isn't the maximum term authorized for Mr. Piper, the higher term.

MR. CLIFFORD: No, I don't think necessarily, Your Honor, because for instance, the offense could be categorized as just the generic offense of conspiracy. And the 841(b)(1) could have been categorized by the Commission as a sentencing provision looking at criminal history as opposed to an offense. And so to conclude automatically that the offense refers to the offense for a given person with a given criminal history is a stretch.

Now is certainly is a rational interpretation, and I think the four cases predating *Stinson* took that approach. But I think if you look at the argument as being one of criminal history as being separate and distinct from offense conduct, then the Commission's interpretation and commentary is certainly rational and certainly respects the integrity of Section 994, the statute. And so if you separate offense conduct from criminal history and you look at offense conduct as what is generating the cap for the career offender situation, you have a situation that's consistent. And

under *Stinson*, that is—has got to be afforded some weight.

THE COURT: Go ahead.

MR. CLIFFORD: That is in essence my position, is [23] that —

THE COURT: Then let's go past the validity question, assume I agree with you for the sake of argument on the validity issue, Ms. McGaughey argues that in any event, I shouldn't give a reduction to defendant Piper because of his particular circumstances as reflected at the sentencing, and that even although I may be authorized to apply 506 retroactively, I shouldn't do it.

MR. CLIFFORD: Your Honor, I'm a little puzzled with the government's position based on the sentences given to the other six people involved in this case. I understand that Piper's history is different. I would point out to the court that despite a lot of analysis of his record, in terms of just looking at convictions, in looking at things that count for sentencing points, criminal history points, really what we see is a guy whose [*sic*] had two prior drug trafficking convictions. He's—there's a number of firearms things out there, but they're not counted, and I think they're irrelevant for career offender purposes.

When you look at some of the sentences that have been given to the other six people in this case, I know the court's very familiar with that, it's very hard to single out the government's—this particular gentleman's conduct versus the other people.

THE COURT: Remind me is he the second highest, [24] it's been some time since I did this, remind me where he fits in the sentencing range.

MR. CLIFFORD: I believe he's the highest, Your Honor, has been given a sentence, total sentence of 30 years.

THE COURT: The next highest, do you remember what that is?

MR. CLIFFORD: I believe that might be Mr. Cook who was a career offender, but where there was a departure taken.

THE COURT: Mr. Wahrer, do you remember, do you know.

MR. WAHRER: The best of my memory, Your Honor, the next highest sentence would be Mr. Connolly.

THE COURT: Connolly.

MR. WAHRER: Who received I think a sentence of something close to nine to 10 years, I believe Mr. Cook would probably be the next one, I think his sentence, close to seven.

THE COURT: Thank you.

MR. CLIFFORD: The government is attempting to portray Mr. Piper as his conduct as just unparalleled by anyone in recent memory, and while I'm not endorsing the conduct, I think that the ultimate benchmark is the sentences received by the other people in this matter. I think under the structure of the guidelines that that's got to be a [25] primary consideration of the court, that there should be some equality in the treatment of the seven coconspirators.

THE COURT: That at the time didn't move me enough to give him the minimum under the range, as you will remember, that I put him I think at a high middle range of the guideline sentence; is that right?

MR. CLIFFORD: It is correct, Your Honor, but it is also correct that I think the court viewed its role as looking at the guideline itself and looking, you

know, paying homage to the guideline and finding that the conduct on top of the requirements of the career offender scheme required boosting, boosting the sentence somewhat, but it really, I think, I would suggest that that kind of analysis would go to the revised sentencing range under this amendment, and I don't think it should—really should be discussed in terms of Amendment 506 and its validity, I think that's largely a legal issue. Again, I don't think that the court should pick and choose which people warrant this special treatment of retroactive treatment. I think that—

THE COURT: Isn't that what the retroactivity amendment contemplates, it's not mandatory; is it?

MR. CLIFFORD: It's not mandatory, Your Honor, but I think that the policy provision that has been enacted by the Commission is again entitled to great weight. And as a practical matter, under the scheme announced by the [26] guidelines and the *Mastratic* case and *Stinson*, I think that uniformity has got to be a primary consideration and that—

THE COURT: Well, I understand that policy argument in the abstract, but there's nothing in the guidelines, is there, that says that all the defendants in a district must get it or none of them?

MR. CLIFFORD: Not that I can see, Your Honor. But I think that ultimately, according to some of the decisions that I read about retroactivity, most notably *Connell*, there really hasn't been much law on that point, but I would expect it almost would be analogous to an upward departure. There's got to be compelling reasons perhaps to single out somebody to not get the retroactive treatment if the court would conclude that the Commission's actions have been consistent with the statutes that are at issue.

There's another area in the government's brief relating to the possibility of an upward departure, I'd like to quickly point out that at the sentencing conference in this matter, the government withdrew its motion for an upward departure, and at the same time, Mr. Piper withdrew his contesting of the quantity. And so I don't think the government should be allowed to argue for an upward departure at this point.

THE COURT: Well, I take it the government's not arguing for an upward departure, what the government is [27] saying if I find that the amendment is valid, as I exercise my discretion whether to apply it retroactively, I should recognize that when the amendment lowers the range, that then an upward departure might be appropriate, and therefore I should leave things alone, that strikes me as a different question as to whether under things as they were, the government sought an upward departure or not.

MR. CLIFFORD: Your Honor, I still don't see any grounds for an upward departure based on the conduct. I know that's debatable, but especially when you look at the incredibly high sentence posited by that range.

A final point I'd like to make relates to the life expectancy of Mr. Piper who is age 50. The government noted I think Page 16 of its brief that by any stretch of life expectancy tables, Mr. Piper would not be receiving a sentence at or near life imprisonment, and I want to take issue with that. Under the—I think when his age is considered and the fact that he's in prison, which certainly doesn't help one's life expectancy, and I don't have any evidence to support what I'm saying, but I think it certainly is debatable

that a 20 year sentence for a man who is 50 years old will be a life, or at or near life sentence.

And I think that a rational decision would be that that—the amended revised sentencing range posited by the Commission would be a sentence at or near life, and for that [28] reason, I think that there's no inconsistency with Section 994(h), assuming the worst case scenario which is otherwise the court would find an inconsistency, in Piper's particular case, the new guideline sentence posited by the court would still be at or near life. And I think that's a factor, and if the court wanted expert evidence in terms of life expectancy issues, perhaps that could be garnered. It certainly is an important issue to Mr. Piper and would certainly warrant some investigation if the court believes that was an appropriate issue.

THE COURT: Thank you very much, Mr. Clifford. Ms. McGaughey.

MS. MCGAUGHEY: If I may go back to the beginning on the question, the legal question of the validity of the application note. I think Your Honor put his finger on it and that is there is absolutely nothing ambiguous in the authorizing legislation which says that for career offenders, the Commission shall promulgate guideline ranges that are at or near the statutory maximum. I think there's absolutely nothing unclear about that.

Now whether Mr. Piper who is a 50 year old man facing 27 years or 37 years is a or near the top, or whether in Mr. Labonte's case, the amendment produces a different result, which is somewhere between 70 percent and 58 percent of the statutory maximum, I don't think ought to make a difference. [29] I think what this court ought to do is compare that clear language to what the Sentencing Commission has

done. The Sentencing Commission has instructed courts to disregard what Congress has told them. Congress has told courts that when a defendant is a repeat drug offender, that the court—that the maximum shall be increased, it's not a discretionary thing, it is a mandatory thing. And in the pecking order of things, the Sentencing Commission does not have the authority to abrogate an act of Congress.

A guideline is not an act of Congress, it does not pass the House of Representatives and the Senate, it is not endorsed by the President. It is an act of an agency. And when an agency chooses to disregard, A, its enabling legislation; and B, a clear mandate of Congress, that the maximum shall be increased, in the government's view, the guideline becomes in abrogation of both of those statutes, not just one, but both of them.

THE COURT: Remind me, are the guideline amendments placed on the table in Congress?

MS. MCGAUGHEY: My understanding, Your Honor, and I asked this question of someone in the Solicitor General's Office, my understanding is that the process for review is different for guidelines and guideline commentary. And my understanding is that there is no procedure for congressional review of guideline commentary, which is what this is.

[30]

Now this brings me back to the *Stinson* point. I may be thick, but I think that *Stinson* sheds only very marginal relevance on this case. What *Stinson* stands for is the now unremarkable proposition that the Sentencing Commission can only do what Congress authorizes them to do. And that if it's a gray area, that the Sentencing Commission can be pre-

sumed to be acting within their statutory mandate, but this is not a gray area.

This is an area where the guideline commentary expressly disregards three separate provisions of 841 in the sentencing provisions, and in addition, that the resulting guideline ranges that are produced if this amendment takes effect produce sentences that are nowhere near at or near the statutory maximum as Congress has defined it.

Now if I may turn for a moment to the discretionary arguments unless the court has more arguments on the—

THE COURT: Just pause for a moment, I'm looking 841, which in Mr. Piper's case, we are dealing with what, (b)(1).

MS. MCGAUGHEY: I get lost every time, it will take me a moment to catch up with you, Your Honor. In Mr. Piper's case, it's 841(b)(1)(B).

THE COURT: (b)(1)(B).

MS. MCGAUGHEY: It provides in essence that if a person commits such violation after having committed a [31] previous violation for a felony under the laws of the United States or any state, that such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life.

THE COURT: Let me find it, just a moment. Yes, okay. Come back to 994(h). All right. Go ahead.

MS. MCGAUGHEY: Just to follow, if I understood the court's train of thought, 994 reads that the Commission shall assure that the guidelines specifies a sentence of imprisonment at or near the maximum authorized for people who fit the—

THE COURT: I was looking at the next phrase which is categories of defendants in which, and then

the list is, has been convicted of a crime of violence, or an 841 conviction, and I take it your argument that the categories go with whether you had a previous conviction, go with quantities, go with things of that sort. Is that correct?

MS. MCGAUGHEY: Correct.

THE COURT: Go ahead.

MS. MCGAUGHEY: Turning again to the discretionary arguments that pertain to Mr. Piper, as I read this court's remarks at the time Mr. Piper was sentenced to 300 months on Count One, the court said before it pronounced that sentence that Mr. Piper was getting a sentence that he deserved. And in the government's view, nothing about the facts and [32] circumstances of his case have changed to make that anything other than the sentence he deserves.

Mr. Clifford has argued that somehow this court ought to exercise its discretion to apply the amended note to his client and perhaps not apply it to other defendants in this district for the purposes of achieving parity among co-defendants within the same case. Although it is not directly on point because it is in the context of a departure, the First Circuit has said that this court should not impose different sentences simply for the purposes if achieving parity with respect to defendants in the same case, that's the *Wogan* case.

But more important, as this court pointed out at the time Mr. Piper was sentenced initially, he has very few convictions that can be counted for criminal history purposes, but a whole host of non-includable convictions that demonstrate an increasing coincidence of guns, drugs, and violence, and those are charges that have never produced criminal convictions for this defendant.

If I recall the court's summary of Mr. Piper's past, it is that he is—has opened the door to more and more violence and more and more drug activity in his life. There's nothing about this defendant that warrants this court exercising its discretion to reduce his sentence at this point.

[33]

THE COURT: Let me ask you about that discretion question, do you maintain that—assuming for the moment that the guideline is valid, that the retroactivity issue is discretionary with the court, and if it is discretionary, what are the factors that need to be enumerated by appellate case law if any in terms of the exercise of the discretion.

MS. MCGAUGHEY: Well, the authority for the proposition that it is discretionary if found both in terms of 18 USC, Section 3582(c)(2), and in terms of the First Circuit's interpretation of that statute in the *Connell* case. What the statute says is that if a range of imprisonment has been reduced by virtue of an amendment to the guidelines that the court may reduce the term of imprisonment after considering the factors set forth in 3553 which are the factors pertaining to the offense and the offender, to the extent they are applicable if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission.

So I think what the statute contemplates is that if the court is satisfied that an amendment has been made retroactive that what the court should do is go back and look at the sentence and decide whether the factors that led it to impose the sentence in the first instance warrant keeping that sentence in place or whether something has drastically changed to make

it a different—make a different sentence [33] permissible and in order. As I understand the First Circuit in *Connell*, it has interpreted the statute to mean that it merely affords the sentencing court discretion to use the amendment if it chooses to do so.

THE COURT: I guess what I'm asking is that do I as I make that decision have to go through the litany of factors in 3553 and make new findings on each of them to determine either to exercise my discretion to go retroactively or not?

MS. MCGAUGHEY: I think what you can do to short form that, if you choose to do so, the court made a very ample statement of reasons in imposing the sentence in the first instance, I think the court has heard full oral argument from the parties, the factors are clearly in the court's mind. I think the court can say for the record, if the court chooses to do so that having reviewed the statement of reasons given at the time sentence was initially imposed and having considered those in light of the amendment to the guideline, that the court is persuaded that its discretion should be exercised to leave the sentence in place. And I think that will suffice. At least I'd be happy to defend it on that basis.

THE COURT: If I did it you'd be the one that would have to. Anything further, Ms. McGaughey?

MS. MCGAUGHEY: Nothing, thank you.

THE COURT: Thank you. Any brief rebuttal?

[35]

MR. CLIFFORD: Yes, Your Honor, very briefly. We almost get back to the exact issue that was argued on appeal, and that is, the meaning of Section 994(h), that does not list conspiracy as one of the enumerated offenses. And so the government's argument that the

Amendment 506 is inconsistent with Section 994(h) is not correct in the sense that the conspiracy offense isn't even listed in that category, that the five enumerated drug offenses chosen by Congress. I think that the First Circuit's reasoning that it was a floor and not a ceiling to use the First Circuit's words had to be premised on the Commission's broad authority under Section 994(a) which is general empowering authority.

So when the government says that Amendment 506 is inconsistent with 994(h), I think certainly a literal reading renders that an incorrect view, and certainly, to the extent the Commission is entitled to interpret Section 994, that the government really cannot disagree with the Commission's own pronouncements because they are entirely consistent with one another. It's only when the Amendment 506 is found to have violated, and the critical statute is 994, that its commentary can be disregarded at least on the legal issue.

And on the discretionary issue, I think that the court's primary function is to look at the guideline range, and again, defer to the Commission's pronouncements. That's all I have.

[36]

THE COURT: Thank you very much.

MS. MCGAUGHEY: Your Honor, may I make one brief comment?

THE COURT: That's fine, thank you. All right. Counsel, thank you, I've benefited from your argument on this as well as the written materials that were filed. And of course I have been the sentencing Judge in the Piper matter so I'm familiar with the whole context, and I did take the opportunity to re-

view the presentence report and also the transcript of my sentencing remarks in the matter.

And at this time, I am in the Piper case going to deny the motion for reduction of sentence. I will assume in this case for the purposes of argument that the guideline amendment that the Commission promulgated is valid and within its authority under the statutes. It's clear from the Commission commentary that this is one of the guidelines that may be applied retroactively, but I also am aware of the *Connell* case and the First Circuit's suggestion as well as the statutory language which is permissive that makes it a discretionary matter as to whether to apply the amendment retroactively.

I did at the time of sentencing consciously impose a sentence that was not at the minimum of the guideline range because in fact I did consider very seriously the circumstances of Mr. Piper's activity in the underlying [37] offense, as well as the criminal history, both counted and uncounted, and made clear to him on the record my concern with what had taken place in his life and the appropriateness of the very high sentence that I imposed which was not at all the minimum sentence that I might have imposed.

I am now looking at Section 3553 of Title 18 which lays out the list of factors that a court is to determine —excuse me, is to consider in determining a sentence. I'm not going to enumerate each one of them again because I don't think that that is necessary, since in fact I did go through the detail of establishing a sentence at the time of sentencing, and I'm satisfied that nothing in this case has changed my opinion and that was the right sentence for Mr. Piper. It was a hard sentence, without a doubt, probably one of the

harder sentences that I've had the occasion to hand down, but I considered it an appropriate sentence.

And although the Commission has now provided for the availability of a retroactive guideline amendment to reduce it, I do not see the grounds for doing that in this case given the nature and circumstances of Mr. Piper's offense and Mr. Piper's history and characteristics. So I'm denying the motion on that basis rather than on the basis of invalidity, and that is the reason for doing so, and again I do thank counsel for their presentations.

Now with respect to Mr. Labonte, moving on to that case, [38] let me just say at the outset, before we go any farther, that I'm sure both counsel are aware that unlike in the Piper case, in Mr. Labonte's case, I did choose the absolute minimum sentence that was available under the guidelines and also expressed my realization that in part what Mr. Labonte was doing was feeding his habit as opposed to being involved as a trafficker for profit and so his circumstances are somewhat different than Mr. Piper's, and I therefore —again I guess I've heard from Mr. Napolitano suggesting that waiting is appropriate in Mr. Labonte's case. And I would be inclined to do that here, Ms. McGaughey, unless you have a strong reason not to for a couple of reasons; one, the uncertainty of the representation; and two, the validity or invalidity of the Commission's amendment would, if it's invalid, it would moot otherwise the consideration of whether there should be a recalculation of that sentence. Is there any good reason for me to press forward in Labonte today under those circumstances?

MS. MCGAUGHEY: I can see reasons to press forward, but I certainly am not going to take vigorous opposition to the court's decision to wait. I would

simply point out that the legal argument with respect to Mr. Labonte about why the amendment does not produce a sentence that is at or near the top specified is very clear, and that it is much easier for the court to see in stark perspective why this amendment is [39] in contravention of the statute.

THE COURT: But I would be dealing then with, in fairness to Mr. Napolitano, with an argument where the adversary process really hasn't had a chance to have its effect.

MS. MCGAUGHEY: I understand that. If the court's principal reason for delay or one of them is to clarify the question of who is to represent Mr. Labonte, I can't take issue with that.

THE COURT: I think that's appropriate because I know, Mr. Napolitano, you're in an uncomfortable position, it's also probably not fair to your client to have—except to have this presented.

MR. NAPOLITANO: That was the reason I sent him the letter, Your Honor, last week he called me collect. I have talked to Diane Powers, she would be happy to, given some time, she couldn't be here at 4:30 today, she just knew about it today, she'd be happy to represent Mr. Labonte.

THE COURT: I don't know Ms. Powers, does she do a fair amount of this kind of practice?

MR. NAPOLITANO: Yes, she does.

THE COURT: Are you familiar with her through your appellate work?

MS. MCGAUGHEY: I have not appeared opposite her that I can remember.

[40]

THE COURT: All right. I'm going to not take any action on Mr. Labonte's request, the motion is pend-

ing, so the matter is preserved. Mr. Napolitano, you should talk again with him, or with Ms. Powers. If Ms. Powers is unable to enter an appearance, and Mr. Labonte wants to proceed in this matter, I will consider appointing counsel to do that so it could be presented. There is of course also the question of whether to wait on the matter of Hunnewell, but I think as Ms. McGaughey has pointed out in light of the new appointment of counsel, there aren't any guarantees as to when that could be decided, so a prompt disposition of the matter in Labonte might well be a vehicle that would get to the circuit sooner that Hunnewell, who knows. That's simply an open question.

MR. NAPOLITANO: Based on the conversations with Mr. Labonte, I'm going file a motion to withdraw, I think Diane will be filing a motion to represent Mr. Labonte.

THE COURT: Well, if you're filing a motion to withdraw, Mr. Napolitano, I want it to be accompanied by a letter to Mr. Labonte telling him that he should either have alternate counsel enter an appearance or to indicate to the court whether he wants the appointment of counsel.

MR. NAPOLITANO: I intend on doing it, Your Honor.

THE COURT: Anything further?

MR. CLIFFORD: Your Honor, if I could, because this is very likely to be appealed.

[41]

THE COURT: Certainly.

MR. CLIFFORD: I would like, if the court is able to now, formal finding of fact if I could with relation to 18, Section 3553, I know the court has reviewed the

sentencing transcript, but I listened carefully just a moment ago, and really, I heard things like nature of the circumstances. I would appreciate it greatly if for the purposes of appeal you could spell out which factors weigh in favor of retroactive application and which factors do not.

THE COURT: Let me think about that for a moment, Mr. Clifford, and the only reason why I'm thinking about it is the precedent that I am setting as to whether indeed a trial Judge has to do that in every case where an amendment may be retroactive.

My initial inclination is for reasons of judicial economy to resist that and to say that that's not required by the case law or the statute for good reason because a court does not at the initial sentencing, and that there has to come a time when we stop spinning out all the reasons and criteria that are listed, but let me also hear from Ms. McGaughey since she will be defending on any appeal as to whether that's something that is probably necessary.

MS. MCGAUGHEY: Your Honor —

THE COURT: Let me make one more comment, I am concerned as a trial judge that there's a tendency of [42] appellate courts to think that trial Judges can always provide all the time necessary to articulate fancy findings to avoid appeal, and I'm concerned not to encourage that more than is appropriate. But let me hear from appellate counsel.

MS. MCGAUGHEY: Let me contrast this to what this court is required to do at the time a sentence is initially imposed by way of highlighting this is a collateral proceeding. In the government's view, the court should not be required to do more on a collateral proceeding that it is required to do at the time a sentence is initially imposed.

When sentence is initially imposed, this court is not required to go through a litany, each of the factors delineated in 3553, the court is not required to give any statement of reasons for the sentence it is about to impose. The court generally does explain to defendants as a matter of beginning the rehabilitation process.

THE COURT: Let me interrupt, I think maybe Mr. Piper's case because of the range of the sentence I may have been required to give an explanation as to where within the range, it was one of those wide range.

MS. MCGAUGHEY: What I mean, Your Honor, you are not required to tick off a checklist even at the time sentence is originally imposed. You are required to explain your thought process to accommodate the range, but there is no litany that was required of you then, I think there should [43] be even less litany that is required of you now. This is a collateral proceeding, this finality has already been achieved, this defendant has taken an appeal of his conviction. Some of the arguments he has made to this court today were resolved by the Court of Appeals against him.

My concern as an attorney who may be in the position of handling these cases is that if the court undertakes the process now, it may start a precedent, and it also may provide fodder for intelligent appellate counsel as we no doubt have to try to compare what is said now with what was said then and create some sort of inconsistency that then requires us to come back and do it a third time.

But my first line is that I don't think anything more than what you have done is necessary, and that is to say that you have reflected on what you did, you

have given thought to whether you should revisit it, and you have decided as a matter of discretion not to revisit it.

THE COURT: Thank you, Ms. McGaughey. Mr. Clifford, I appreciate the inquiry that you've made, but I think that I will stand by my instincts that it's important to differentiate the criteria in this exercise of discretion, I think I have given an adequate reason. If I haven't, you have still another ground for appeal in terms of proceeding, but I appreciate the inquiry. Anything further then, counsel?

[44]

MR. CLIFFORD: No, Your Honor.

THE COURT: Thank you both very much, it was very helpful. The court will stand adjourned.

(At 5:10 p.m., the foregoing proceedings were concluded.)

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of my stenographic notes of the proceedings held in the above-entitled matter.

Date this 20th day of March, 1995.

/s/ CINDY PACKARD-ROBITAILLE
CINDY PACKARD-ROBITAILLE
Official Court Reporter

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1538

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE LABONTE, DEFENDANT, APPELLEE

No. 95-1226

UNITED STATES OF AMERICA, APPELLEE

v.

DAVID E. PIPER, DEFENDANT, APPELLANT

No. 95-1101

UNITED STATES OF AMERICA, APPELLEE

v.

ALFRED LAWRENCE HUNNEWELL, DEFENDANT, APPELLANT

No. 95-1264

STEPHEN DYER, PETITIONER, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT, APPELLEE

Before: TORRUELLA, CHIEF JUDGE, SELYA, CYR, BOUDIN*, STAHL** and LYNCH, CIRCUIT JUDGES.

ORDER OF COURT

Entered: January 24, 1996

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
WILLIAM H. NG, CLERK

By: /s/ [illegible] O'NEIL
O'NEIL
Chief Deputy Clerk

[cc: Ms. McGaughey, Messrs. Ciraldo, Clifford, Bourbeau & Miller]

Concurrence follows.

Dissents follow.

---

* Judge Boudin concurs on the denial of the petition for rehearing en banc.

** Judge Stahl and Judge Lynch dissent on the denial of the petition for rehearing en banc.

BOUDIN, *Circuit Judge.* This is a difficult case with effective arguments on each side but there is no present conflict between the panel majority and any other circuit. Further, nothing that this circuit decides, by panel or en banc decision, will resolve definitively an issue that could affect many cases throughout the United States. The sooner the Supreme Court has an opportunity to consider whether to review this case, the better for all concerned.

STAHL, *Circuit Judge*. I dissent from the denial of en banc review. The issue presented is complex and important. The amendment prescribes a significant reduction in the sentences for defendants deemed by Congress to be most in need of lengthy incarcerations. More importantly, because the amendment applies retroactively, it will undoubtedly burden district courts throughout the country with the task of reviewing on a case by case basis a substantial number of requests for resentencing. Indeed, this is already the case in the First Circuit. Moreover, this burden will arise notwithstanding what, I believe, are substantial and legitimate doubts about the amendment's validity. The question of the amendment's validity is a significant issue that, I am confident, every circuit will eventually need to address. While the issue is exceedingly close, the arguments on either side are sharply drawn and may benefit little from further consideration by our sister circuits. In fact, I think it likely that a conflict in the circuits along the lines dividing the panel in this case will ultimately result. Notably, this issue had been pending in the Seventh Circuit since last spring. Thus, for the reasons stated, I believe it would be advantageous to every circuit if the Supreme Court would review the decision of this court.

LYNCH, *Circuit Judge*. I dissent from denial of the petition for rehearing en banc. The issues raised by these cases as to the validity of Amendment 506 to the Sentencing Guidelines have enormous implications for the administration of criminal justice both in this Circuit and elsewhere. U.S.S.G. App. C, amend. 506 (Nov. 1994) (amending U.S.S.G. § 4B1.1, comment. (n.2)). I agree with both Judge Stahl and Judge Boudin that the earlier there could be a definitive answer on these issues from the Supreme Court the better.

APPENDIX G

1. Section 994(h) of Title 28 of the United States Code provides as follows:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959, and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

2. Section 4B1.1 (including accompanying Commentary) of the United States Sentencing Guidelines (Nov. 1, 1995) provides as follows:

§ 4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Commentary

Application Notes:

1. "Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in § 4B1.2.

2. "Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for the purposes of this guideline is twenty years and not thirty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28

U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ." 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] the Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy); id. at 26,515 (brief summary of amendment); id. at 26, 517-18 (statement of Senator Kennedy).

ORIGINAL

(10)

No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

UNITED STATES OF AMERICA

Petitioner

v.

ALFRED L. HUNNEWELL

Respondent

MOTION OF RESPONDENT ALFRED L. HUNNEWELL
PURSUANT TO RULE 39 TO PROCEED *IN FORMA PAUPERIS*

Respondent, ALFRED L. HUNNEWELL, by and through his attorney of record, MICHAEL C. BOURBEAU, who was previously appointed by the United States Court of Appeals for the First Circuit pursuant to the Criminal Justice Act, 18 U.S.C. § 3506A, hereby moves this Honorable Court pursuant to Rule 39 of the Rules of the Supreme Court to allow him to proceed *in forma pauperis* with the filing of the Brief in Opposition to the Petition for Writ of Certiorari filed herewith, and further for the appointment of MICHAEL C. BOURBEAU as counsel for Respondent pursuant to Rule 39((7).

Date: May 22, 1996

Respectfully submitted,

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95-1726

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T. David Raftery, Esq., Of Counsel

May 22, 1996

Clerk's Office
United States Supreme Court
1 First Street N.E.
Washington, DC 20543

RE: U.S. v. Hunnewell (Labonte, et. al)
Case No.

Dear Clerk:

Enclosed for filing in the above case, please find an original and 10 copies of Respondents Opposition Brief along with an original and 3 copies of a motion for leave to proceed *in forma pauperis*.

Please contact me if there are any questions with the enclosed.

Thank you.

Sincerely,

MICHAEL C. BOURBEAU

ORIGINAL

ORIGINAL

95-1726

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

ALFRED L. HUNNEWELL
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT ALFRED L. HUNNEWELL'S OPPOSITION BRIEF TO PETITION

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Attorney for Respondent
ALFRED L. HUNNEWELL

QUESTION PRESENTED

Whether the United State's Sentencing Commission's overall implementation of the statutory directive in 994(h), through the career offender guideline in 4B1.1 as amended, is reasonably consistent with the language and purpose of the instruction in 994(h) which requires a sentence "to a term of imprisonment at or near the maximum term authorized?"

OPINION BELOW

As stated by Petitioner the opinion of the Court of Appeals is reported at 70 F.3d 1396 and is contained in Petitioner's Appendix at 1a-53a.

JURISDICTION

Jurisdiction of this Honorable Court is allowed pursuant to 28 U.S.C. § 1254(i).

STATUTORY PROVISION INVOLVED

Petitioner has correctly set forth the statutory provision and U.S. Sentencing Guideline Commentary that is involved in this case.

STATEMENT OF THE CASE

Respondent ALFRED L. HUNNEWELL respectfully opposes the Petition for Writ of Certiorari on the ground that the Guideline Commentary in issue provides the trial court with needed

discretion to issue an appropriate sentence of <u>at least</u> 151 months (almost 13 years) within a broad guideline range, App. at 9a,fn. 4, which sentence would be fair and comparable to similarly situated defendants.

Specifically this case focuses on the severe consequences of subsequent convictions on relatively small street offenses for distribution of small amounts of contraband and the extent to which the Government will expend its resources to ensure that defendants receive the maximum possible sentence. Mr HUNNEWELL was charged and plead guilty to two counts of distribution of a small amount of cocaine and a small amount of marijuana in violation of 21 U.S.C. §§ 801, et. seq. *Id.* Although the potential guideline sentence for the charged offenses alone, in the absence of further enhancements, based on a marijuana equivalency factor of 138.6 grams, would have mandated a sentence of Offense level 11, Category VI, for a total sentence of 27-33 months, (*See* HUNNEWELL's Opening Brief at 2-3) Mr. HUNNEWELL was determined to be a career offender under U.S.S.G. § 4B1.1 and thus subject to the harsh penalties of said provisions. HUNNEWELL was also subject to the enhanced maximum penalties of 21 U.S.C. § 841 (b)(1)(c) based on two prior state convictions for drugs (*See* Petition at 5, fn.1). His resulting sentence was: Offense level 31 (34 minus 3 for acceptance of responsibility) for a total of 188 months. App at 9a.

In November, 1994 the United States Sentencing Commission enacted Amendment 506 to U.S.S.G. § 4B1.1 which re-defined "statutory maximum" for purposes of the application of that guideline provision as the "statutory maximum" for the current offense exclusive of past convictions. Application of the Amendment to the instant case would potentially reduce Appellant's sentence because Appellant's new base level would be 32 and once adjusted for acceptance of responsibility, level 29 with a resulting sentencing range of 151-188 months, *Id.* This case concerns solely the Government's objection with this Amendment which potentially would only incrementally decrease the sentence of Mr. HUNNEWELL and similarly situated defendants.

REASONS FOR DENYING PETITION

This Honorable Court has already made clear that United States Sentencing Guideline Commentary that "interprets or explains a guideline is *authoritative* unless it violates the Constitution or a federal statute, or is inconsistent with, or plainly erroneous reading of that guideline," *Stinson v. United States*, 508 U.S. 36,___, 113 S.Ct. 1913,1915, 123 L.Ed.2d 598 (1993)(emphasis added). While the Petition correctly identifies the conflict among the United States Circuit Courts on the issue of whether the Amendment in issue is violative of federal statutes, *Petition* at 14-17, the issue concerns only a minor

incremental change in the Guidelines that is both not an important question of law, nor appear to effect many cases. As Petitioner acknowledges, this Amendment only effects those limited cases where both the defendant is determined to be a Career Offender *and* when the Government chooses to exercise its *discretion* to allege prior drug convictions under 21 U.S.C. § 851 (a)(1),*See* Petition at 20.

One need only examine the Guidelines Policy Statement and Guideline Commentary to other provisions to realize that in order to create uniformity in sentencing, the guidelines "will not please those who wish the Commission to adopt a single philosophical theory --- to establish a simple and perfect set of characterizations and distinctions....[the guidelines are developed] as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore more effective system." U.S.S.G. Introduction, the Basic Approach. Sentencing adjustments to the prosecutorial charging decision are minor limitations on discretion that are necessary to carry out these sentencing goals. For example, the Introductory Commentary to U.S.S.G. § 3D, sentencing on multiple counts, specifically indicates that the "grouping" of offenses is done "[i]n order to limit the significance of the charging decision and to prevent multiple punishment for substantially identical offense conduct." Amendment 506 is simply a similar limitation.

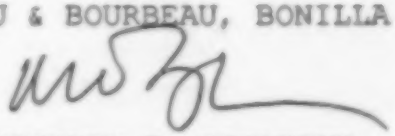
The Guidelines and the Career Criminal Provisions therein, as written, already require extremely harsh sentences, *See Opinion of the Court of Appeals,* App. 6a,fn.1. In the absence of said provisions Mr. HUNNEWELL would only be subject to a sentence of 27-33 months. In view of other methodology for courts to adjust guideline sentences through departure in appropriate cases, *see e.g.* U.S.S.G. 4A1.3,(under and over representation of criminal history) and U.S.S.G. § 3D1.4 Background Commentary ("Situations in which there will be inadequate scope for ensuring appropriate additional [or excessive] punishment--- can be handled through departure"), the incremental adjustment to a defendant's total punishment does not appear to merit this Honorable Court's consideration.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Date: May 22, 1996 Respectfully submitted,

BOURBEAU & BOURBEAU, BONILLA & TOCCHIO



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No. 95-1726

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE, ALFRED LAWRENCE HUNNEWELL, DAVID E. PIPER AND STEPHEN DYER, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT GEORGE LaBONTE'S BRIEF IN OPPOSITION

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Counsel of Record for Respondent George LaBonte

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18 pp

QUESTION PRESENTED

WHETHER U.S.S.G. § 4B1.1 as interpreted by Amendment 506 to the Commentary, is a permissible construction of 28 U.S.C. § 994(h) which provides that categories of career offenders be sentenced, "at or near the maximum term authorized."

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1726

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE, ALFRED LAWRENCE HUNNEWELL, DAVID E. PIPER AND STEPHEN DYER, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT GEORGE LABONTE'S BRIEF IN OPPOSITION

Respondent George LaBonte requests that the Court deny the Government's Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the First Circuit. The opinion of the First Circuit is reported at 70 F.3d 1396.

OPINIONS BELOW

Petitioner's summary of the Opinions Below accurately sets forth the relevant lower court opinions except for the description of the District Court Order as denying George

LaBonte's Motion for Resentencing. (Petitioner's Brief at p. 2.) Mr. LaBonte's motion for resentencing was granted. App. 54a-66a.

STATEMENT OF THE CASE

In November of 1994, the United States Sentencing Commission's Amendment to Application Note 2 (Amendment 506) to the Career Offender Guideline § 4B1.1 became effective. Amendment 506 for the first time explicitly defined the phrase "Offense Statutory Maximum" as contained in U.S.S.G. § 4B1.1, as:

> the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or a controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal records

U.S.S.G. § 4B1.1, comment (n.2) (Nov. 1994). In essence, the amendment sought to prevent an additional sentencing enhancement to be applied to a sentence already once multiplied due to a particular defendant's prior record. (*See* U.S.S.G., App. C, Amend. 506, at 409 (Nov. 1994) (where the Commission explained its interpretation as avoiding unwarranted double counting.) Pursuant to its authority under U.S.S.G. § 1B1.10(c) (Nov. 1994) the Commission specified that Amendment 506 be applied retroactively. It is significant to note that the proposed Amendment 506 was, prior to its effective date, first submitted

to Congress for comment. *See* 50 Fed. Reg. 23,608 (1994). Congress took no action to prevent the Amendment from taking effect.

George LaBonte, Respondent herein, sought resentencing in the United States District Court for the District of Maine pursuant to U.S.C. 3582(c)(2), based solely upon the new interpretation of 4B1.1 as clarified by Amendment 506. The District Court, Hornby, J., granted Mr. LaBonte's Motion for Resentencing specifically finding that the interpretation of 4B1.1 now espoused by the Sentencing Commission was a valid one which did not violate a federal statute. See App. 54a-66a.

One of the federal statutes against which Amendment 506 is measured is 28 U.S.C. § 995(h) which directs the Sentencing Commission to assure that the guidelines create a sentence, "at or near the maximum term authorized for categories of defendants...," that are over eighteen, have two prior felony drug trafficking crimes or crimes of violence, and have been convicted of an additional drug trafficking crime or crime of violence. 28 U.S.C. 994(h). However, 994(h) was not the only statute containing directives to the Sentencing Commission from Congress. A variety of factors to be considered by the Commission in setting guidelines sentences are set forth in 28

U.S.C. § 994(b)-(n). These include a directive that there be certainty and fairness in sentencing and that unwarranted sentence disparities be avoided, 28 U.S.C. 994(f), and a directive to the Commission to periodically review and revise the guidelines. 28 U.S.C. 994(o). In addition, 28 U.S.C. § 991(b)(1)(B), the enabling statute that created the sentencing guidelines, specifically directs that the Commission avoid, "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B).

The possibility of sentencing disparity for those convicted of the same criminal conduct in the context of the career offender guidelines lies in the discretion given prosecutors under 21 U.S.C. § 851(a)(1). Even if a defendant's prior criminal history would qualify him for the career offender enhancement, no such enhancement can even be considered unless the government chooses to list the prior convictions in an information giving notice that the enhancement will be sought. *See* 21 U.S.C. 851(a)(1); *Also see U.S. v. LaBonte*, 885 F. Supp. 19 (D. Me. 1995). App. 62a.

As a result of the District Court's granting of Mr. LaBonte's motion for resentencing, his sentence was modified from

the 188 months originally imposed down to 151 months. The government then appealed the district court's order granting Mr. LaBonte's motion for resentencing. The court of appeals affirmed the district court decision though on somewhat different grounds. Using the standard of review set out in *Chevron, USA Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), the court of appeals examined the Sentencing Commission's interpretation of the guideline in light of whether such an interpretation was based on a permissible construction of the statute. App. 12a-13a. The approach taken by the court of appeals in performing this analysis was succinctly summarized in their opinion as follows:

> These appeals focus on a single sentence that appears in 28 U.S.C. § 994(h), a sentence that requires the Commission to adopt guidelines "that specify a sentence to a term of imprisonment at or near the maximum term authorized for [certain] categories of defendants." This problematic sentence presents three issues of statutory interpretation necessitating two distinct interpretations of the *Chevron* standard. The first application combines two issues; it concerns the explication of the word "maximum" as that word is used in Section 994(h) and, concomitantly, the meaning of the word "categories" as used therein. The second occasion for *Chevron* analysis involves an exegesis of the phrase "at or near" as used in the same sentence. The two problems are interrelated but they are somewhat different in nature.

App. 13a. The court then went on to undertake the analysis described above and found that the intent of Congress in defining the subject terms was unclear and, that the interpretation of the statute by the Sentencing Commission, as embodied in Amendment 506, was reasonable. In reaching this conclusion, the court found that the term "category of defendants," if given any meaning, clearly allowed the interpretation given by the commission.

> The statute explicitly refers to "categories of defendants," namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guidelines, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests.

App. 19a. Finding, therefore, that the sentencing commission's interpretation was consistent with and not in violation of 994(h), the court of appeals affirmed the district court's modification of Mr. LaBonte's sentence from 188 to 151 months. App. 30a.

The government's subsequent petition for rehearing was denied by the original panel and a majority of the full court denied the government's request for rehearing *en banc*. App. 110a-111a. Judges Stahl and Lynch dissented. App. 112a-133a.

The government then filed the instant petition which was docketed on April 23, 1996.

ARGUMENT

Considerations relating to a grant of *certiorari* in the United States Supreme Court are set out in Rule 10 of the Supreme Court Rules. Though subsection (a)(i) of that Rule specifically lists a conflict between two United States Circuit Courts as a reason for granting *certiorari*, the initial paragraph of Rule 10 bears repeating.

Considerations Governing Review on Writ of Certiorari

> 1. A review on writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for writ of *certiorari* will be granted only when there are compelling reasons therefor, such as:
>
> (a)(i) When a United States court of appeals has rendered a decision on an important matter in conflict with the decision of another United States Court of Appeals on the same matter; or -

United States Supreme Court Rules, R. 10.

There is no dispute in the instant case that two courts of appeals have rendered decisions in conflict with two other courts of appeals on the same matter. The question, however, is whether the matter is important enough for this Court to grant

certiorari and hear this case and whether there are compelling reasons for doing so.

First, in the specific context, i.e. the individual case of George LaBonte, the fact remains that the total effect of the application of Amendment 506 to Mr. LaBonte's sentence was a reduction of that sentence from 188 months to 151 months, a change of only three years and one month out of a total original fifteen and one-half year sentence. Certainly such a modest reduction, which could also be brought about by something as minor as a future change in good time credits, is not such an important and compelling issue as to warrant full consideration by this nation's highest court.

On a broader level, the effect of Amendment 506 on sentences that would have been imposed based on the government's interpretation would in most instances be similar to the reduction received by Mr. LaBonte. For example, a seven level reduction in a defendant's offense level occasioned by using five years as the offense statutory maximum rather than ten years because of the statutory enhancement, would lower a sentence by no more than 49 months for a defendant with a criminal history category of VI. *See* U.S.S.G. § 4B1.1. Again, a four year sentence reduction does not rise to the level of a compelling and

important issue requiring the United States Supreme Court's attention.

The other issue worth examining is whether the circuit split on this issue will have a dramatic negative impact in the future. This analysis should take into account the number of defendants who will be found with circumstances warranting the application of Amendment 506. The type of defendant who is eligible for the 4B1.1 enhancement is one that is eighteen years or older, has two prior felony convictions involving narcotics or violent crimes, and the instant offense of conviction is an offense involving narcotics or a violent crime. Given these parameters, it is likely that even the possibility of a sentencing enhancement under § 4B1.1 will only apply to a small percentage of all persons convicted of federal crimes in 1995. Since the Amendment in question can only pertain to a small percentage of defendants, the issue may not be one, even on a nationwide scale, that justifies the granting of *certiorari*.

Finally, due to the nature of the issue, it is also entirely possible that certain developments over time may resolve the split of viewpoints without Supreme Court intervention. Additional commentary by the Sentencing Commission may convince other circuits that the Amendment, and the First Circuit's

interpretation of it, are indeed valid. More importantly, Congress can at any time pass legislation which could definitively resolve the issue at bar either endorsing the commission's interpretation or specifically rejecting it.

CONCLUSION

For the reasons set forth above, Respondent George LaBonte respectfully requests that the petition for a writ of certiorari of the United States be denied.

Respectfully submitted,

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May 22, 1996

No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE, ALFRED LAWRENCE HUNNEWELL,
DAVID E. PIPER AND STEPHEN DYER, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **MOTION OF RESPONDENT GEORGE LABONTE TO PROCEED IN FORMA PAUPERIS** by first class mail, postage prepaid, on this 22nd day of May, 1996.

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VIA EXPRESS MAIL

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Re: *United States of America, Petitioner v. George LaBonte, et al., Respondent*, No. 95-1726

Dear Sir:

Please find enclosed for filing one original and ten copies of Respondent George LaBonte's Brief in Opposition; one original and ten copies of Respondent George LaBonte's Motion to Proceed In Forma Pauperis, which are each attached to the Briefs as required by Rule 39(2); and duly executed Certificates of Service for the Brief and for the Motion.

Thank you for your assistance in this regard.

Very truly yours,

John A. Ciraldo

JAC/lca
Enclosures

cc: Drew Days, III, Solicitor General (w/enc.)
Michael Bourbeau, Esquire (w/enc.)
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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **RESPONDENT GEORGE LaBONTE'S BRIEF IN OPPOSITION** by first class mail, postage prepaid, on this 22nd day of May, 1996.

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REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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---

1. Respondents LaBonte and Hunnewell acknowledge (LaBonte Br. in Opp. 7; Hunnewell Br. in Opp. 3) that the courts of appeals are in conflict on the question presented in this case. Since the filing of our petition for a writ of certiorari, the Eighth Circuit (like the Seventh and Tenth Circuits before it) has held that Amendment 506 is inconsistent with the Sentencing Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders, and is therefore invalid. See *United States* v. *Fountain*, Nos. 95-2264 & 95-2374, 1996 WL 210638 (May 1, 1996). Particularly in light of the First

Circuit's denial of rehearing en banc in these consolidated cases, see Pet. App. 109a-113a, the conflict in authority will not be eliminated absent review by this Court.

2. Respondents also contend (LaBonte Br. in Opp. 8-9; Hunnewell Br. in Opp. 4-5) that the circuit conflict does not warrant this Court's review because (a) the Career Offender Guideline applies only to a small percentage of federal offenders, and (b) invalidation of Amendment 506 would effect a relatively small incremental change in the sentences imposed under that Guideline. Those arguments lack merit.

a. Resolution of the question presented will affect a substantial number of cases, particularly in light of the Commission's decision to give Amendment 506 retroactive application. See Pet. App. 112a (Stahl, J., dissenting from denial of rehearing en banc); see also *id.* at 113a (Lynch, J., dissenting from denial of rehearing en banc) ("The issues raised by these cases as to the validity of Amendment 506 to the Sentencing Guidelines have enormous implications for the administration of criminal justice both in this Circuit and elsewhere."). Indeed, the fact that five courts of appeals have ruled on this issue since the Amendment's November 1, 1994, effective date belies any suggestion that the issue arises infrequently.

b. Precisely because the Career Offender Guideline applies only to the most serious federal offenders, proper application of that Guideline is of particular importance to the federal sentencing scheme. Congress expressly required that the Guidelines applicable to such offenders should "specify a sentence to a term of imprisonment at or near the maximum term authorized." 28 U.S.C. 994(h). Respondents' suggestion that incremental changes in the guideline

ranges applicable to such offenders are of little significance cannot be reconciled with that congressional mandate.

* * * * *

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1996

(8)

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QUESTION PRESENTED

Whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 70 F.3d 1396. A prior opinion of the court of appeals affirming respondent Piper's conviction is reported at 35 F.3d 611, and a prior opinion affirming respondent Dyer's conviction is reported at 9 F.3d 1. The prior opinions of the court of appeals affirming the convictions of respondents LaBonte and Hunnewell are unpublished, but the judgments are noted at 19 F.3d 1427 (Table) and 10 F.3d 805 (Table), respectively. The order of the district court granting LaBonte's motion for resentencing (Pet. App. 54a-66a) is reported at 885 F. Supp. 19. The orders of the district court denying Hunnewell's and Piper's motions

for resentencing (Pet. App. 71a-72a, 73a-108a) and Dyer's motion under 28 U.S.C. 2255 (Pet. App. 67a-70a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1995. A petition for rehearing was denied on January 24, 1996. Pet. App. 109a-113a. The petition for a writ of certiorari was filed on April 23, 1996, and was granted on June 24, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

The following provisions are set forth in an appendix to this brief: 21 U.S.C. 841 and 851, 28 U.S.C. 994, Sentencing Guidelines §§ 4B1.1 and 4B1.2 (Nov. 1, 1995), with accompanying Commentary, and Amendment 506 to the Guidelines Manual.

STATEMENT

Respondents George LaBonte, Alfred Lawrence Hunnewell, and Stephen Dyer, as well as defendant David E. Piper, were convicted of federal controlled substance offenses in the United States District Court for the District of Maine. Pet. App. 7a. Before November 1, 1994, each of the four was sentenced as a career offender under Sentencing Guidelines § 4B1.1 (Nov. 1, 1993). Pet. 3. The court of appeals affirmed each defendant's conviction and sentence. Subsequently, each defendant filed a motion seeking a reduction in his sentence based on an amendment to the career offender provision of the Sentencing Guidelines promulgated by the United States Sentencing Commission, effective November 1, 1994. In two of the cases, the district court found that the

amendment was contrary to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, and refused to apply it. In the other two cases, another judge of the same district court found that the amendment was valid. The court of appeals consolidated the ensuing appeals. A divided panel of the court of appeals upheld the amendment, and affirmed in part, reversed in part, and remanded. Pet. App. 1a-53a.

1. In 1984, Congress created the United States Sentencing Commission and charged it with the responsibility to promulgate sentencing guidelines for the federal system. See 28 U.S.C. 991; *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). In addition to articulating general goals for federal sentencing that the Commission was directed to meet, see *Neal* v. *United States*, 116 S. Ct. 763, 767 (1996), Congress imposed a variety of specific requirements on the Commission. 28 U.S.C. 994(b)-(n). Among those requirements is the following provision, dealing with career offenders convicted of crimes of violence or drug trafficking crimes:

> The [Sentencing] Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [(1) has been convicted of a felony that is a crime of violence or a drug trafficking crime, and (2) has two prior felony convictions involving crimes of violence or drug trafficking crimes].

28 U.S.C. 994(h).

The Sentencing Commission implemented Section 994(h) in Section 4B1.1 of the Sentencing Guidelines, entitled "Career Offender," which provides as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

> * If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

The applicable sentencing range is then derived from the Sentencing Table, Guidelines, Ch. 5, Pt. A.

In order to determine a defendant's offense level under the Career Offender Guideline, it is necessary

to identify the maximum sentence to which the defendant is exposed. Before November 1, 1994, the commentary to the Career Offender Guideline defined the phrase "Offense Statutory Maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction." Guidelines § 4B1.1, Application Note 2 (Nov. 1, 1993). Neither the Guideline itself nor any accompanying commentary specified which "maximum term" was to be used when federal law established a basic statutory maximum for persons convicted of a particular offense, but also provided an enhanced statutory maximum term for persons convicted of that offense who also had prior convictions. Such enhanced sentences for recidivists are an integral feature of sentencing for federal narcotics crimes.[1] The courts of appeals that had addressed the question uniformly concluded that the "offense statutory maximum" for a defendant with prior convictions was the enhanced maximum term, not the maximum term authorized for a defendant with no prior convictions. See *United States* v. *Smith*, 984 F.2d 1084, 1086-1087 (10th Cir.), cert. denied, 114 S. Ct. 204

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[1] See 21 U.S.C. 841(b)(1)(A), (B), (C) and (D); 21 U.S.C. 962. For example, Section 841(b)(1)(C) states that persons convicted of specified controlled substance offenses "shall be sentenced to a term of imprisonment of not more than 20 years." Section 841(b)(1)(C) further provides, however, that, "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years." The enhanced penalties may be imposed only if "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a)(1).

(1993); *United States* v. *Saunders*, 973 F.2d 1354, 1364 (7th Cir. 1992), cert. denied, 506 U.S. 1070 (1993); *United States* v. *Garrett*, 959 F.2d 1005, 1009-1011 (D.C. Cir. 1992); *United States* v. *Amis*, 926 F.2d 328, 330 (3d Cir. 1991); *United States* v. *Sanchez-Lopez*, 879 F.2d 541, 558-560 (9th Cir. 1989).

By Amendment 506, the Commission rejected the approach that had prevailed in the courts. Effective November 1, 1994, the Sentencing Commission amended the commentary to Guidelines § 4B1.1 to define the phrase "Offense Statutory Maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." Guidelines § 4B1.1, Application Note 2. Thus, "where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the 'Offense Statutory Maximum' for the purposes of this guideline is twenty years and not thirty years." *Ibid.* In promulgating the amendment, the Commission explained that by precluding use of the enhanced statutory maximums, Amendment 506 "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). It also stated that "the enhanced maximum sentences provided for recidivist drug offenders * * * did not exist" at the time that 28 U.S.C. 994(h) was enacted. 59 Fed. Reg. at 23,609. Pursuant to its authority under 28 U.S.C. 994(u), the Commission

made Amendment 506 retroactive, so that a sentencing court would have discretion to reduce a sentence imposed before the effective date of the amendment.[2] See Guidelines § 1B1.10(c).

2. The court of appeals' decision involves consolidated appeals from four cases in which defendants moved for reductions of their sentences based on the amendment. All four defendants had been sentenced before the effective date of Amendment 506. In each case the district court had utilized the enhanced statutory maximum penalty in calculating the defendant's total offense level under Guidelines § 4B1.1 (Nov. 1, 1993). Each of the defendants subsequently moved for resentencing based on Amendment 506. The government argued that Amendment 506 is contrary to Section 994(h) and is therefore invalid. In two of the cases, the district court concluded that Amendment 506 is a valid exercise of the Commission's authority. The court reduced one defendant's sentence but declined to reduce the sentence of the other defendant, in light of the seriousness of that defendant's offense. In the other two cases, the district court determined that Amendment 506 is inconsistent with 28 U.S.C. 994(h) and thus invalid, and it therefore denied the defendants' motions for resentencing.

George LaBonte: After a plea of guilty, respondent LaBonte was convicted on one count of possession of cocaine with the intent to distribute it, in violation of

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[2] The Department of Justice opposed the proposed amendment before the Commission, and, following its promulgation, determined that federal prosecutors should oppose the application of the amendment by sentencing courts on the ground that it is invalid as inconsistent with 28 U.S.C. 994(h).

21 U.S.C. 841(a)(1). At LaBonte's sentencing, the district court found that LaBonte qualified as a career offender. Based on LaBonte's prior drug convictions, the district court determined that his "offense statutory maximum" was more than 25 years' imprisonment and set his offense level at 34. After a three-level reduction for acceptance of responsibility, LaBonte had an offense level of 31 and a sentencing range of 188-235 months' imprisonment. The district court imposed a sentence of 188 months' imprisonment. The court of appeals dismissed LaBonte's appeal. 19 F.3d 1427 (1st Cir. 1994) (Table); see Pet. App. 7a-8a.

After the effective date of Amendment 506, LaBonte moved for resentencing under 18 U.S.C. 3582(c)(2).[3] The district court concluded that the amendment is valid and granted LaBonte's motion. See Pet. App. 54a-66a. Using the definition of "offense statutory maximum" required by Amendment 506, the court found that LaBonte's total offense level was 32. See *id.* at 7a-8a. The court again deducted three levels for acceptance of responsibility. See *id.* at 8a. Application of Amendment 506 resulted in a sentencing range

[3] That Section states that a sentencing court "may not modify a term of imprisonment once it has been imposed except that — * * * (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant * * * the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) [of Title 18] to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2).

of 151 to 188 months' imprisonment. *Ibid.*; *id.* at 57a. The district court imposed a sentence of 151 months' imprisonment. *Id.* at 66a.

David E. Piper: After a plea of guilty, Piper was convicted of conspiracy to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846, and using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). The district court employed the enhanced statutory maximum and determined that Piper's offense level was 37. The court reduced that level by three based on Piper's acceptance of responsibility and calculated Piper's sentencing range as 262 to 327 months' imprisonment. Piper received a sentence of 300 months' imprisonment. The court of appeals affirmed. 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995); see Pet. App. 8a.

Piper later sought resentencing under Amendment 506, arguing that, if the unenhanced statutory maximum were used, his sentencing range would be 210 to 262 months' imprisonment. See Pet. App. 8a & n.3. The district court assumed that the amendment is valid, but declined to give Piper its benefit. *Id.* at 8a, 102a. The court noted that application of the amendment was discretionary, and it concluded that the amendment should not apply in Piper's case because of the seriousness of his offense. *Ibid.*

Alfred Lawrence Hunnewell: After a plea of guilty, Hunnewell was convicted on two counts of possessing controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Using the enhanced statutory maximum, the district court set Hunnewell's offense level at 34, deducted three levels for acceptance of responsibility, and found that Hunnewell's sentencing range was 188 to

235 months' imprisonment. The court sentenced Hunnewell to 188 months' imprisonment. The court of appeals affirmed. 10 F.3d 805 (1st Cir. 1993) (Table), cert. denied, 114 S. Ct. 1616 (1994); see Pet. App. 8a-9a.

After November 1, 1994, Hunnewell moved for a reduction in sentence. He asserted that application of Amendment 506 would lower his sentencing range to 151 to 188 months' imprisonment. See Pet. App. 9a n.4. The district court held that Amendment 506 is invalid because it is "in contravention of 21 U.S.C. § 841(b)(1)(C) and 28 U.S.C. § 994(h)." *Id.* at 71a. Accordingly, the court denied the motion for resentencing. *Ibid.*

Stephen Dyer: After a plea of guilty, Dyer was convicted of conspiracy to possess controlled substances with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Using the enhanced statutory maximum, the district court set Dyer's total offense level at 34 and refused to reduce that level based on acceptance of responsibility, resulting in a sentencing range of 262 to 327 months' imprisonment. The court imposed a sentence of 262 months' imprisonment. The court of appeals affirmed. 9 F.3d 1 (1st Cir. 1993) (per curiam); see Pet. App. 9a.

After November 1, 1994, Dyer filed a petition under 28 U.S.C. 2255, seeking to have his conviction set aside. Pet. App. 9a. In the alternative, Dyer asked to be resentenced based on Amendment 506. *Ibid.* Amendment 506, if applied, would have reduced Dyer's Guidelines sentencing range to 210-262 months' imprisonment. *Id.* at 10a n.5. The district court denied the petition, rejecting Dyer's reliance on Amendment 506 on the basis of its prior decision on Hunnewell's request for resentencing. *Id.* at 70a.

3. The government appealed the district court's order granting LaBonte's motion for resentencing. Piper, Hunnewell, and Dyer appealed the district court orders denying their motions. The court of appeals consolidated the cases, and a divided panel held that Amendment 506 is valid. Pet. App. 1a-53a.

The court of appeals first determined that the two-step approach of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the judicial review of agency rules provides "the proper criterion for determining whether a guideline (or, for that matter, commentary that suggests how a guideline should be read) contravenes a statute." Pet. App. 11a. Under that approach, the court of appeals asked first whether Congress had addressed the precise question under review; if so, "that is the end of the matter." *Id.* at 12a (quoting *Chevron*, 467 U.S. at 842). If, however, the statute is silent or ambiguous on the issue, the "question for the court is whether the agency's answer is based on a permissible construction of the statute." *Ibid.* (quoting *Chevron*, 467 U.S. at 843). Applying that analysis, the court "f[ou]nd no clear congressional directive regarding the meaning of the term 'maximum' as that term is used in [28 U.S.C.] 994(h)." *Id.* at 19a. In the court's view, the meaning of the word "maximum" was influenced by its presence in the statutory phrase "maximum term authorized for categories of defendants." *Id.* at 14a. The court acknowledged that the phrase could mean that the "maximum term" is the enhanced maximum applicable to the "categor[y]" of repeat offenders for whom the government filed a notice of prior crimes under 21 U.S.C. 851(a)(1). Pet. App. 14a. But the court also thought that

> [t]he word "categories" plausibly can be defined * * * to include all offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant (e.g., all drug traffickers, or all repeat offender drug traffickers, who are charged with violating 21 U.S.C. § 841(a)(1)). On this view, the word "maximum" refers to the unenhanced statutory maximum (USM), see 21 U.S.C. § 841(b)(1), since this represents the highest possible sentence applicable to all defendants in the category.

Ibid. Based on that perceived ambiguity, the court asked whether the Commission's interpretation of the statute was a reasonable one. *Id.* at 19a.

The court of appeals concluded that "[t]he Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests." Pet. App. 19a. It noted that "[t]he root purpose of the Career Offender Guideline, U.S.S.G. § 4B1.1, is to enhance repeat offenders' sentences," *id.* at 23a, and it determined that "[t]he revamped guideline not only accomplishes that purpose but also coheres with Congress's discernible aims in making enhanced penalties available under [21 U.S.C.] 841," *id.* at 23a-24a. The court also held that the Career Offender Guideline, as construed under Amendment 506, is a reasonable implementation of the directive in Section 994(h) to specify sentences "at or near" the maximum. *Id.* at 24a-28a.

The court of appeals then considered the application of Amendment 506 to the four defendants before it.

The court affirmed the district court's judgment reducing respondent LaBonte's sentence based on Amendment 506. Pet. App. 30a. The court also affirmed the judgment with respect to Piper. *Id.* at 30a-32a. The court of appeals rejected Piper's contention that the district court was required to resentence him in accordance with Amendment 506. It explained that the pertinent statutory provision (18 U.S.C. 3582(c)(2)) "authorize[d] the district judge to resentence when resentencing is consistent with the policies underlying [Amendment 506], but it neither compel[led] the judge to do so nor limit[ed] his inquiry to the consistency question." Pet. App. 30a.[4] With respect to respondents Hunnewell and Dyer, the court of appeals set aside the district court's orders denying the motions for resentencing and remanded the cases so as to permit the district court to consider whether the respondents should be resentenced in accordance with Amendment 506. *Id.* at 32a-34a. The court also affirmed the district court's dismissal of Dyer's Section 2255 petition. *Id.* at 34a-37a.

Judge Stahl dissented from the majority's determination that Amendment 506 is valid.[5] Judge Stahl concluded that Amendment 506's approach to the implementation of 28 U.S.C. 994(h) is

> inherently implausible because it effectively nullifies the criminal history enhancements carefully

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[4] Defendant Piper did not seek further review of the court of appeals' decision affirming the district court's denial of his motion for reduction of sentence. Because the judgment of the court of appeals was adverse to Piper, our petition for a writ of certiorari did not name him as a respondent.

[5] Judge Stahl concurred in the court of appeals' dismissal of respondent Dyer's Section 2255 petition. See Pet. App. 38a.

enacted in statutes like 21 U.S.C. § 841. These statutes, to which Congress expressly referred in the text of § 994(h), provide an intricate web of enhanced penalties applicable to defendants who are repeat offenders or whose offenses resulted in death or serious bodily injury. The [Commission's] interpretation, however, completely disregards these enhanced penalties because, under that interpretation, all defendants must be sentenced at or near the unenhanced maximum whether or not the enhanced penalties apply. Recognizing that Congress specifically referred to these statutes in the text of § 994(h), it seems absurd to suppose that Congress did not intend to preclude this result.

Pet. App. 40a. Judge Stahl also argued that "the legislative history strongly suggests that Congress intended 'maximum term authorized' [in 28 U.S.C. 994(h)] to refer, in appropriate circumstances, to the enhanced maximum penalty." *Id.* at 42a.[6]

SUMMARY OF ARGUMENT

A. Congress directed the Sentencing Commission to "assure" that, for adult offenders who commit their third felony drug offense or crime of violence, the

[6] Along with the First Circuit in the instant case, the Ninth Circuit has upheld Amendment 506 as a permissible exercise of the Commission's discretion. *United States* v. *Dunn*, 80 F.3d 402 (9th Cir. 1996). The Seventh, Eighth, and Tenth Circuits have held that Amendment 506 is inconsistent with Section 994(h) and is therefore invalid. See *United States* v. *Hernandez*, 79 F.3d 584 (7th Cir. 1996), petitions for cert. pending, Nos. 95-8469, 95-9335; *United States* v. *Fountain*, 83 F.3d 946 (8th Cir. 1996); *United States* v. *Novey*, 78 F.3d 1483 (10th Cir. 1996), petition for cert. pending, No. 95-8791.

Guidelines specify a sentence of imprisonment "at or near the maximum term authorized." 28 U.S.C. 994(h). That language has a clear and unambiguous meaning. For repeat offenders of the federal narcotics laws, the maximum statutory terms of imprisonment are enhanced to reflect the defendants' status as recidivists. See, *e.g.*, 21 U.S.C. 841(b)(1). The "maximum term authorized" under Section 994(h) thus refers to the enhanced maximum, not to the lower ceiling applicable to first-time offenders.

The context surrounding the phrase "maximum term authorized" in Section 994(h) does not make the phrase ambiguous. Section 994(h) does refer to the Commission's obligation to establish sentencing ranges for "categories" of defendants. But that reference does not make it plausible to construe the words "maximum term authorized" to refer to a combined category of (1) recidivists who are eligible for the statutory enhancements (because the government has filed the information identifying prior convictions required by 21 U.S.C. 851), as well as (2) recidivists who are not eligible for the statutory enhancements (because the government did not file the required information). The word "authorized" itself connotes the statutory maximum prescribed by Congress—not the particular maximum applicable in a given case. And the reference to "categories" is explained by the remaining requirements of Section 994(h): that the defendant be 18 years old or older, be convicted of a drug offense or crime of violence, and have two prior qualifying convictions.

Section 994(h) does give the Commission latitude to prescribe sentences "at or near" the maximum. That authority, however, does not empower the Commission to select a lower than "maximum" term that the

sentences must approach or reach. Finally, the larger context of Section 994(h) further indicates that Congress had in mind the enhanced maximum terms for recidivists, rather than the unenhanced maximums for first-time offenders. Enhanced sentences for recidivists are a longstanding feature of federal narcotics law. Congress amended those very statutes contemporaneously with the enactment of Section 994(h). The legislature, therefore, was well aware that the "maximum" terms for many of the defendants covered by Section 994(h) were enhanced because of their prior convictions. The Commission's approach would virtually nullify those enhancements.

B. Amendment 506 is not intended to produce a Guideline range "at or near" the enhanced maximum term. Amendment 506 expressly defines the phrase "Offense Statutory Maximum" to mean "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." Guidelines § 4B1.1, Application Note 2. The amended commentary is contrary to Section 994(h) and is therefore invalid. *Stinson* v. *United States*, 508 U.S. 36, 38 (1993).

The Commission's stated justifications for Amendment 506 do not reconcile it with the statute. In any event, the Commission's reasoning is unsound. Use of the enhanced maximum in implementing Section 994(h) does not constitute improper "double counting" of prior convictions; it simply achieves the statutory mandate. Nor does use of the enhanced maximum create unwarranted disparity between individual defendants based on federal officials' exercise of prosecutorial discretion. As a practical matter, federal

prosecutors have discretion to determine (by filing or declining to file the information required by 21 U.S.C. 851(a)(1)) whether a particular defendant will be subject to an enhanced statutory maximum. Such disparities are not "unwarranted," however; they are a reflection of the prosecutorial discretion that is a basic characteristic of criminal law enforcement. Finally, if its aim is to deal with perceived unwarranted disparate treatment, the Commission's solution is overbroad, because it virtually precludes application of the enhanced statutory maximum terms. That outcome clearly contravenes the statute.

ARGUMENT

THE COMMISSION'S AMENDMENT OF THE COMMENTARY TO THE CAREER OFFENDER GUIDELINE TO TREAT AS THE MAXIMUM AUTHORIZED SENTENCES THE LOWER SENTENCES APPLICABLE TO FIRST-TIME OFFENDERS CONFLICTS WITH 28 U.S.C. 994(h)

The Sentencing Commission "enjoys significant discretion in formulating guidelines" for classes of federal offenders. *Mistretta* v. *United States*, 488 U.S. 361, 377 (1989). That discretion, however, is cabined by the directions that Congress gave to the Commission. *Id.* at 379. This case involves Congress's specific direction to the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for specified categories of repeat offenders. 28 U.S.C. 994(h). In response to that direction, the Commission promulgated Guidelines § 4B1.1 and set forth commentary to explain its application. That commentary can be valid only if it complies with applicable federal statutes, including Section 994(h);

if the commentary violates a statute, it is invalid. *Stinson* v. *United States*, 508 U.S. 36, 38 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."); cf. *Neal* v. *United States*, 116 S. Ct. 763 (1996).

In this case, respondents faced maximum terms of imprisonment that were enhanced by statute to reflect their recidivist status. Under the Commission's Career Offender Guideline as explicated by Amendment 506, however, respondents are to be sentenced "at or near" statutory "maximum term[s]" calculated as though respondents were *not* recidivists. Guidelines § 4B1.1, Application Note 2. The Commission's approach conflicts with Section 994(h). It cannot be reconciled with the language of the statute; it largely nullifies Congress's decision to subject repeat offenders to enhanced statutory maximum terms of imprisonment; and it rests on no sound justification.

A. Section 994(h) Requires The Commission To Establish Sentences For Specified Repeat Offenders That Are At Or Near Maximum Terms Enhanced To Reflect The Offenders' Recidivist Status

1. Section 994(h) states that "[t]he Commission shall assure that the guidelines specify a sentence to a term of imprisonment *at or near the maximum term authorized*" for specified categories of repeat offenders, *i.e.*, those who are 18 years of age or older and who have been convicted for the third time of a felony crime of violence or federal drug offense. 28 U.S.C. 994(h) (emphasis added). The phrase "maximum term authorized" refers to the maximum statutory term provided for the offense of conviction, as the Commission has recognized: "the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute." Guidelines § 4B1.1 (background); see S. Rep. No. 225, 98th Cong., 1st Sess. 120 (1983) ("proposed 28 U.S.C. 994(h) requires the sentencing guidelines to specify a term of imprisonment at or near the statutory maximum for a third conviction of a felony that involves a crime of violence or drug trafficking.").[7]

Congress has provided for enhanced maximum terms of imprisonment for recidivists, particularly drug recidivists. For example, 21 U.S.C. 841(b)(1)(C), applicable to drug traffickers, provides for a base "term of imprisonment of not more than 20 years," but states that "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years."

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[7] In *United States* v. *R.L.C.*, 503 U.S. 291 (1992), this Court construed 18 U.S.C. 5037(c), which provides that the term of detention ordered for a juvenile found to be a juvenile delinquent may not extend beyond "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." The Court held that the applicable "maximum term" was the upper limit of the Guidelines range that would apply to a similarly situated adult offender. 503 U.S. at 306-307. Section 994(h), however, is designed to constrain the Commissioner's discretion in the promulgation of Guidelines for career offenders. It would be entirely circular to suggest that the Commission had complied with Section 994(h) simply by prescribing sentences "at or near" the top of the Guidelines range. Indeed, as noted in text, the Commission has recognized that the "maximum term authorized" within the meaning of Section 994(h) is the statutory maximum.

The maximum term authorized by statute for such a repeat offender, therefore, is 30 years, the enhanced statutory maximum—not 20 years, the unenhanced maximum. "The word 'maximum' naturally connotes the upper limit of a range, or the greatest quantity possible or permissible"; thus, "where a statute provides two tiers of punishment, common sense suggests that the maximum falls at the upper limit of the higher of the two tiers." *United States* v. *Hernandez*, 79 F.3d 584, 595 (7th Cir. 1996).

The meaning of Section 994(h) is thus unambiguous. All defendants covered by Section 994(h) are recidivists, and a substantial number are subject to enhanced statutory maximum terms of imprisonment as a result of their recidivism.[8] Section 994(h) requires the Commission to provide for sentences that

[8] Not every defendant covered by Section 994(h) would be subject to an enhanced statutory maximum term of imprisonment based on his recidivist status. For example, a person who commits a narcotics offense in violation of 21 U.S.C. 841 after twice being convicted of crimes of violence would not be subject to an enhanced statutory maximum. In the government's experience, however, the majority of defendants covered by Section 994(h) are repeat drug offenders like respondents who are subject to enhanced statutory maximum terms. Cf. U.S. Sentencing Comm'n, *1994 Annual Report* 75 (indicating that 63.4% of defendants sentenced as career offenders were convicted of drug trafficking offenses). In any event, Amendment 506 will have a practical impact only on persons who, like respondents, are subject to enhanced maximum terms of imprisonment based on their recidivist status. The amendment's sole purpose and effect is to ensure that such defendants are subject to Guidelines ranges "at or near" the unenhanced rather than the enhanced statutory maximum. If (as we contend) the "maximum term authorized" for such defendants is the enhanced maximum, Amendment 506 subverts the operation of Section 994(h) in every case to which it is applied.

come close to or equal (*i.e.*, that are "at or near") the enhanced "maximum term" that Congress has authorized for those repeat offenders. The lower term available to first-time offenders is not the "maximum term authorized" for three-time offenders such as respondents.

2. Statutory language must be read in context. *Reno* v. *Koray*, 115 S. Ct. 2021, 2025 (1995). Nothing in Section 994(h)'s context, however, permits the phrase "maximum term authorized" to be interpreted to mean "the lesser term of imprisonment that is authorized for defendants who lack prior convictions." The court of appeals found ambiguity in the statute by observing that Section 994(h) refers to the "maximum term authorized for *categories of defendants*" (emphasis added). The court thought that the relevant "category of defendants" might be defined to include defendants for whom the government did not file an information under 21 U.S.C. 851(a)(1), and who were therefore ineligible for the recidivist enhancement.[9] Pet. App. 14a. That is incorrect. First, Section 994(h)'s reference to the maximum term "*authorized*" for categories of defendants is naturally read to refer to the sentence authorized by statute. The statutorily authorized sentence is not changed by the government's omission to file the procedural notice required by Section 851(a)(1) in a particular case; it simply

[9] Section 851(a)(1) states that the enhanced penalties may be imposed only if "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." If the government fails to give the required notice, therefore, the enhanced maximum would not be available to the sentencing court in a particular case.

means that the defendant in that case may not be sentenced to the authorized maximum. "But a decision of that type in an individual case does not undo the fact that the enhanced penalties remain *authorized* for other repeat offenders convicted under section 841." *Hernandez*, 79 F.3d at 597.

Second, Section 994(h) itself makes clear what "categories of defendants" Congress had in mind: "The categories of defendants intended by Section 994(h) are expressly defined as those 'in which the defendant is eighteen years or older and —(1) has been convicted of a [qualifying] felony . . . ; and (2) has previously been convicted of two or more prior felonies, each of which is [a qualifying felony].'" *United States* v. *Novey*, 78 F.3d 1483, 1489 n.7 (10th Cir. 1996), petition for cert. pending, No. 95-8791. "The 'category' referred to is thus the recidivist or repeat offender category." *United States* v. *Fountain*, 83 F.3d 946, 952 (8th Cir. 1996). The "maximum [prison] term authorized" for that "category" is the enhanced sentence prescribed by law.

Nor does any flexibility in Section 994(h)'s phrase "at or near" the maximum imply that the statute allows sentences to be based on the unenhanced maximum term. As the Seventh Circuit has explained, "the question presented by Amendment 506 is not how close the offense level and resulting sentencing range must be to the statutory maximum. * * * The debate instead is over which statutory maximum the Commission is to aim for." *Hernandez*, 79 F.3d at 599. Accord *United States* v. *Fountain*, 83 F.3d at 952 ("The issue here is not how close the sentence must be to the statutory maximum, but to which statutory maximum it must be close."). Whatever latitude Section 994(h) affords the Commission in deciding how

close a sentence must come to the maximum to be "near" it, Section 994(h) does not permit the Commission to select as a "maximum term" a sentence that is lower than the actual term authorized by Congress.

Finally, Congress could not have overlooked the fact that many of the recidivists covered by Section 994(h) face longer "maximum" sentences than first-time offenders. When Section 994(h) was enacted, federal law already provided enhanced penalties for repeat drug offenders.[10] See, *e.g.*, 21 U.S.C. 841(b)(1)(A), (b)(1)(B) (1982) (enhancing maximum term from 15 to 30 years, and from 5 to 10 years, respectively, for a defendant with a prior conviction for "an offense punishable under this paragraph"). Indeed, the Comprehensive Crime Control Act of 1984, of which the Sentencing Reform Act was a part, amended those very provisions. See 98 Stat. 2068; S. Rep. No. 225, *supra*, at 258-259 (noting that under the "current structure of section 841, these maximum penalties would be doubled where the defendant has a prior felony drug conviction" and explaining that the amendment permits prior state and foreign, as well as federal, drug convictions to trigger enhancement). Congress is "generally presume[d] [to be] knowledgeable about existing law pertinent to the legislation it

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[10] In proposing Amendment 506, the Commission asserted that "the enhanced maximum sentences provided for recidivist drug offenders * * * did not exist" at the time that 28 U.S.C. 994(h) was enacted. 59 Fed. Reg. 23,609 (1994). That statement is incorrect. As the district court in the *LaBonte* case recognized, "[t]he exact amounts of the enhancements may have changed, but the concept was well in place when section 994(h) was enacted, and had been since at least 1970." Pet. App. 63a n.4; accord *United States* v. *Novey*, 78 F.3d at 1490-1491; *Hernandez*, 79 F.3d at 598 n.10.

enacts." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). In this case, where the text of Section 994(h) refers specifically to 21 U.S.C. 841, and the Senate Report accompanying the legislation describes the enhanced penalties applicable to recidivists under that provision, Congress must be understood to have had those enhancements in mind in referring to the "maximum term authorized."

3. Thus, all the available evidence indicates that Congress enacted Section 994(h) with the awareness that the maximum terms of imprisonment authorized for repeat drug offenders were greater than the maximum sentences for offenders with no prior convictions. There is no reason to suppose that Congress intended for the Commission to disregard those enhancement provisions in fashioning Guidelines ranges "at or near the maximum term authorized" for repeat offenders covered by the Career Offender Guideline. Indeed, to disregard those enhancements is "inherently implausible because it effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841." Pet. App. 40a (Stahl, J., dissenting); accord *Fountain*, 83 F.3d at 953; *Novey*, 78 F.3d at 1488.

B. Amendment 506 Does Not Require Consideration Of Enhanced Maximum Sentences And Is Therefore Invalid

Amendment 506 is not intended to produce a sentencing range that comes close to or equals the enhanced "maximum term" of imprisonment applicable to recidivists such as respondents. Rather, the Amendment explicitly bases sentences for career offenders on the maximum term "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." Guidelines § 4B1.1, Application Note 2. By ignoring recidivist enhancements to "maximum" terms, the amendment violates the directive of Section 994(h), and it is therefore invalid. *Stinson* v. *United States*, 508 U.S. 36, 38 (1993).

None of the Commission's stated justifications for Amendment 506 reconciles it with Section 994(h). The Commission explained that, in its view, the amendment "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). Quite apart from the fact that those rationales do not address the applicable statutory language, neither of them is sound on its own terms.

1. The Commission's allusion to "unwarranted double counting" is enigmatic. The reference may reflect the Commission's view that it is unfair for prior convictions to be used both to trigger the statutory enhancement and to increase the defendant's total offense level under the Career Offender Guideline. See *Hernandez*, 79 F.3d at 599 ("The notion that use of the enhanced maximum amounts to double counting * * * stems from the fact that the defendant's prior convictions trigger both the statutory enhancement and the Career Offender Guideline."). Alternatively, the perceived "double counting" may be the use of the defendant's prior convictions both in determining the total offense level and in computing the criminal history category. See *Novey*, 78 F.3d at 1486 ("Under [the government's] interpretation [of Guidelines § 4B1.1], a defendant's prior convictions are, in effect, used twice: first to enhance the defendant's criminal

history category and again to enhance the defendant's offense level."). As the district court in the *LaBonte* case recognized, see Pet. App. 63a n.4, neither version of the "double counting" objection has merit.

The "double counting" objection overlooks the purpose of Section 994(h): to ensure that Guidelines sentences for specified classes of repeat offenders will closely track the statutory maximum. Section 994(h)'s directive that the Guidelines specify a sentence of imprisonment for a career offender "at or near" the "maximum term authorized" necessarily requires that increases in that maximum statutory term will be translated by some mechanism into increases in the applicable Guidelines sentence. Calling that mechanism "double counting" does not undercut the fact that it is simply a way to elevate the Guidelines range in order to achieve compliance with the statutory mandate.[11]

There is nothing inherently objectionable about a computation mechanism that considers prior convictions both in determining a defendant's criminal

[11] Indeed, even under Amendment 506, that form of "double counting" would still be present, albeit to a reduced extent. Guidelines § 4B1.1 provides that in determining the guideline range for a career offender, "[i]f the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply." It also provides that "[a] career offender's criminal history category in every case shall be Category VI." See page 4, *supra*. Because the table is used only if a defendant is a career offender (*i.e.*, only if he has at least two prior felony convictions of the specified type), the Guideline thus expressly uses a defendant's prior convictions in increasing his offense level, as well as in determining his criminal history category.

history category and in increasing his offense level. As the district court explained,

> there is no double counting in the automatic assignment of the highest criminal history category and an increase for the total offense level, because the whole exercise is simply designed to yield, by formula, a sentence that will be at or near the maximum of something, and the only question is what that "something" should be.

Pet. App. 63a n.4. Section 994(h) requires the Commission to "assure" that repeat offenders covered by its provisions will, as a general matter, be subject to Guidelines sentences "at or near the maximum term authorized." The propriety of Amendment 506 ultimately depends on whether the sentencing ranges it produces satisfy that congressional directive. Conceivably, the Commission could devise an alternative computation mechanism that is consistent with Section 994(h) yet avoids the "double counting" of prior convictions. But the Commission's desire to avoid such double counting cannot justify adoption of a sentencing scheme that fails to meet Section 994(h)'s requirements.

2. The Commission's second justification for Amendment 506 posits that if the government files an information under 21 U.S.C. 851 for one defendant, but not another, the resulting difference in the maximum possible term is an "unwarranted disparity." Use of the enhanced statutory maximum in applying the Career Offender Guideline, however, does not create "unwarranted disparity" between individual defendants based on federal officials' exercise of prosecutorial discretion. Under Section 851(a)(1), the enhanced statutory maximum penalties for narcotics offenses

may be imposed only if the government has given the defendant pretrial notice of the prior convictions on which the government intends to rely. See note 9, *supra*. Thus, as a practical matter, federal prosecutors have discretion to determine (by filing or declining to file the requisite notice) whether a particular narcotics defendant will be subject to an enhanced statutory maximum term of imprisonment. Congress evidently did not regard the resulting disparities as "unwarranted," however, or it would not have made the applicability of the enhanced maximum terms contingent upon the government's filing of the information described in Section 851(a)(1).[12]

More fundamentally, prosecutorial discretion is an inherent feature of criminal law enforcement. *United States* v. *Armstrong*, 116 S. Ct. 1480, 1486 (1996). The discretion extends not only to what charges to bring, *ibid.*, but also, in certain instances, to what sentencing options are available to the court. See *Melendez* v. *United States*, 116 S. Ct. 2057 (1996) (sentencing court may generally not depart below a statutory mandatory minimum sentence without a motion filed

[12] The Commission's rationale also overlooks that Section 994(h) applies to persons who commit "crime[s] of violence" after having twice been convicted of violent crimes or of specified drug offenses. Federal law imposes enhanced maximum terms of imprisonment for some repeat offenders who have committed violent crimes. See 18 U.S.C. 2114 (postal robbery), 2247 (recidivist statute governing sexual abuse at specified locations). The applicability of those enhanced penalties does not require that the government provide the defendant with prior notice of the convictions on which it intends to rely at sentencing. Cf. *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962) (due process does not require pretrial notice of applicability of recidivist enhancement).

by the government requesting that action under 18 U.S.C. 3553(e)). The fact that the statutory recidivist enhancements for drug offenders depend on the prosecutor's filing of an information under 21 U.S.C. 851(a)(1) provides another example of prosecutorial discretion. "The disparities in the sentences assigned to career offenders cannot be described as mere happenstance, then, but as the foreseeable result of the discretion that Congress has assigned to (and left with) prosecutors." *Hernandez*, 79 F.3d at 600. And insofar as Amendment 506 prevents "disparity associated with variations in the exercise of prosecutorial discretion," it does so by virtually eliminating the government's ability to invoke the enhanced statutory maximum sentences in any case. That rationale for Amendment 506 cannot be squared with a statutory scheme requiring sentences for career offenders "at or near" those maximum terms.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to affirm the judgments of the district court with respect to respondents Hunnewell and Dyer, and to reverse the judgment of the district court with respect to respondent LaBonte.

Respectfully submitted.

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AUGUST 1996

1. Section 841 of Title 21 of the United States Code provides:

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance

containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose

a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance

containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final,

such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a

prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the

defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in

accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana

for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(c) Repealed. Pub. L. 98-473, title II, § 224(a)(2), formerly § 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, § 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18 or imprisoned not more than 10 years, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term

of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been

adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

2. Section 851 of Title 21 of the United States Code provides:

§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior

conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

(Pub. L. 91-513, title II, § 411, Oct. 27, 1970, 84 Stat. 1269.)

3. Section 954 of Title 28 of the United States Code provides:

§ 994. Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents[1] of an appropriate sentence, and shall take them into

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[1] So in original, Probably should be "incidence".

account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular

attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21

U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an

offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming

to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the

amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of

the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

4. Section 4B1.1 of the Federal Sentencing Guidelines provides:

PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD

§ 4B1.1. Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

Commentary

Application Notes:

1. *"Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in §4B1.2.*

2. *"Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior crimi-*

nal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for the purposes of this guideline is twenty years and not thirty years. If more than one count of conviction is a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of

similar criminal conduct . . . ." 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy); id. at 26,515 (brief summary of amendment); id. at 26,517-18 (statement of Senator Kennedy).

Historical Notes: Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendments 47 and 48); November 1, 1989 (*see* Appendix C, amendments 266 and 267); November 1, 1992 (*see* Appendix C, amendment 459); November 1, 1994 (*see* Appendix C, amendment 506); November 1, 1995 (*see* Appendix C, amendment 528).

5. Section 4B1.2 of the Federal Sentencing Guidelines provides:

§ 4B1.2 ***Definitions of Terms Used in Section 4B1.1***

(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(2) The term "controlled substance offense" means an offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent

to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere.*

Commentary

Application Notes:

1. *The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.*

2. *"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly*

charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device), or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

3. *"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction*

in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

4. *The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.*

Historical Note: Effective November 1, 1987, Amended effective January 15, 1988 (*see* Appendix C, amendment 49); November 1, 1989 (*see* Appendix C, amendment 268); November 1, 1991 (*see* Appendix C, amendment 433); November 1, 1992 (*see* Appendix C, amendment 461); November 1, 1995 (*see* Appendix C, amendment 528).

* * * * *

6. Amendment 506 to the Guidelines Manual provides:

506. The Commentary to §4B1.1 captioned "Application Notes" is amended in Note 2 by deleting:

> "'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense.",

and inserting in lieu thereof:

> "'Offense Statutory Maximum,' for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum

> term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)). For example, where the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the 'Offense Statutory Maximum' for the purposes of this guideline is twenty years and not thirty years."

This amendment defines the term "offense statutory maximum" in §4B1.1 to mean the statutory maximum prior to any enhancement based on prior criminal record (*i.e.*, an enhancement of the statutory maximum sentence that itself was based upon the defendant's prior criminal record will not be used in determining the alternative offense level under this guideline). This rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions. It is noted that when the instruction to the Commission that underlies §4B1.1 (28 U.S.C. § 994(h)) was enacted by the Congress in 1984, the enhanced maximum sentences provided for recidivist drug offenders (*e.g.*, under 21 U.S.C. § 841) did not exist. **The effective date of this amendment is November 1, 1994.**

(6)

No. 95-1726

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES,

Petitioner,

v.

GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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October 1996

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QUESTION PRESENTED

Is the Sentencing Commission's design of the "career offender" guideline invalid under 28 U.S.C. § 994(h), if that guideline is a reasonable exercise of the powers and responsibilities that Congress delegated to the Commission in the Sentencing Reform Act as a whole?

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SUMMARY OF ARGUMENT

The Sentencing Reform Act delegates to the United States Sentencing Commission, not to the federal courts, the task of designing sentencing guidelines for "categories of offenders" who have committed federal crimes. Within that Act, § 994 of Title 28, United States Code, contains most of the directions Congress gave to the Commission concerning the design of the guidelines; that section includes dozens of directives, some expressed in broad philosophical terms and some relatively specific, all of which the Commission is charged with following.

No single provision of § 994 is intended to be implemented in disregard of the others. The balancing of statutory goals in the design of particular guidelines is at the heart of the task that Congress entrusted to the expertise of the Commission. The explicit decision by Congress to refer the matter of career offender sentences to the Sentencing Commission, rather than to mandate that courts impose sentences at or near the maximum in such cases, *see* S. Rep. No. 98-225, 98th Cong., 1st Sess. 175 (1983), reflects Congress's understanding that implementing § 994(h) requires balancing and harmonizing many provisions of law. Congress elected to give the Sentencing Commission significant flexibility in implementing harsh sentences for repeat offenders.

The design of § 994 as a whole reveals a clear congressional directive that the courts must defer to the Sentencing Commission's implementation of the Sentencing Reform Act's many potentially conflicting provisions. So long as any particular guideline can be explained as a reasonable implementation of the statute as a whole,

including, of course, any subsection of the Act that specifically relates to the matter addressed by the guideline in question, that guideline is not subject to judicial invalidation. The Commission's implementation of the mandate of § 994(h), calling for significantly increased sentences for "career offenders," including the definitional commentary to USSG § 4B1.1 added by Amendment 506, is entirely reasonable. That should end the matter.

For these reasons, this case does not call for resolution under the familiar two-part test of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, even under that test, the Sentencing Commission's actions are fully sustainable. The government contends that courts must disregard the definitional commentary to § 4B1.1 because it unambiguously violates 28 U.S.C. § 994(h). But because Congress has not "directly addressed the precise question at issue," 467 U.S. at 842, § 994(h) is not free from ambiguity within the meaning of *Chevron*. Because the Commission's implementation of that provision resolves those ambiguities in a reasonable manner that is consistent with the statutory command, the judgment below must be affirmed.

ARGUMENT

Introduction. The Sentencing Reform Act of 1984 created the United States Sentencing Commission and directed it to formulate sentencing guidelines for use by federal judges. *See* Pub. L. 98-473, tit. II, ch. II, 98 Stat. 1987 (*codified at* 18 U.S.C. §§ 3551 *et seq.* and 28 U.S.C. §§ 991-998) ("the Act"). In the Act, Congress included

dozens of mandates and suggestions to guide the Commission in fulfilling this formidable assignment. Among these is an instruction requiring that the guidelines call for sentences for certain "categories of" repeat offenders that are "at or near" the "authorized" statutory maximum. 28 U.S.C. § 994(h). In compliance with this directive, the Commission promulgated a guideline, USSG § 4B1.1, mandating severe penalties for "career offenders," defined as defendants at least eighteen years old who have been convicted for at least the third time of either a crime of violence or a controlled substance offense.

A defendant who qualifies as a career offender is automatically placed in Category VI, the highest under the guidelines.[1] A career offender's offense level is the greater of (1) the level obtained by applying chapters two and three of the guidelines, or (2) the level drawn from a table set forth in § 4B1.1. That table sets the offense level based on the "offense statutory maximum" for the current offense. Thus, if that maximum is ten years, the offense level is deemed to be 24, producing a guideline range (assuming no further adjustment or departure) of

[1] Chapter 4, part A, of the guidelines sets forth the rules for determining an offender's criminal history category. These rules measure the frequency, recency and severity of the defendant's prior criminal conduct. The defendant receives between 1 and 3 "points" for each prior conviction that the guidelines do not exclude. (For example, certain older convictions are excluded; *see* USSG § 4A1.2(e).) The total number of points determines the criminal history category, from I (little or no prior record) through VI (extensive record). This category then forms the horizontal axis of the guidelines' sentencing table. *See* USSG ch. 5, pt. A.

100-125 months' imprisonment; likewise, for a statutory maximum of 20 years, the level is 32, with a range of 210-262 months.

As originally adopted in 1987, § 4B1.1 did not contain a definition of the phrase "offense statutory maximum." This lacuna raised questions in cases where the statutory maximum applicable to a certain category of defendants was enhanced for one or another reason. For example, federal drug offenders with a record of a prior "felony drug offense," as currently defined in 21 U.S.C. § 802(43),[2] may be subject to an enhanced maximum, but only if the prosecutor seeks that exposure by invoking the notice and procedural provisions of 21 U.S.C. § 851. In commentary accompanying § 4B1.1, adopted in 1994 as Amendment 506 to the guidelines, the Sentencing Commission defined "offense statutory maximum" to mean "the maximum term of imprisonment authorized" for the offense of conviction "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." USSG § 4B1.1, comment., appl. note 2; USSG, appx. C, amend. 506.[3] Under the definitional commentary

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[2] At different times since the adoption of 21 U.S.C. § 841 in 1970, the kind of prior conviction necessary to trigger an enhanced maximum term has varied somewhat. *Cf.* 21 U.S.C. § 802(12) (defining "drug"), § 802(13) (defining "felony" differently from its usage in subsection (43)).

[3] Other "career offenders" are subject to enhanced maximum terms for the offense of conviction based on entirely different reasons not affected by Amendment 506: for example, where death results from the commission of a drug offense, 21 U.S.C. § 841(b), or where the offense occurs within 1000 feet of a

added by Amendment 506, every "career offender" sentence is extremely harsh and represents an enormous enhancement over what would otherwise be the guideline sentence.

I. THE UNITED STATES SENTENCING GUIDELINE FOR "CAREER OFFENDERS," AS CLARIFIED BY AMENDMENT 506, IS NOT SUBJECT TO JUDICIAL INVALIDATION, BECAUSE IT IS A REASONABLE EXERCISE OF THE POWERS AND RESPONSIBILITIES CONGRESS DELEGATED TO THE SENTENCING COMMISSION IN THE SENTENCING REFORM ACT.

Congress granted the Sentencing Commission "significant discretion in formulating" the sentencing guidelines. *Mistretta v. United States*, 488 U.S. 361, 377 (1989). Section 994(h) is not an exception to but rather part of this legislative design. Congress required the Sentencing Commission to implement § 994(h) not in isolation but rather in the full context of the Sentencing Reform Act's many interrelated goals. The Commission responded by developing USSG § 4B1.1 and then by refining its implementation through Amendment 506. A review of the relevant statutory provisions demonstrates that the Commission fulfilled its mandate in an entirely reasonable manner. The government's challenge to the "career offender" guideline therefore must fail.

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highway truck stop, 21 U.S.C. § 849, or when a deadly weapon is used in a crime of violence, *e.g.*, 18 U.S.C. § 2113(d), or when certain crimes of violence result in injury or death. *E.g.*, 18 U.S.C. § 242.

A. Section 994(h) Requires the Sentencing Commission To Balance Complex and Competing Policy Considerations.

More than a decade of congressional efforts to change fundamentally the nature of federal criminal sentencing culminated in the Sentencing Reform Act of 1984. The Act's central reform was creating the Sentencing Commission and charging it with drafting sentencing guidelines that would have the force of law. *Mistretta v. United States*, 488 U.S. 361, 367-68 (1989). In § 994 of Title 28, the Act sets forth the Sentencing Commission's many duties. The provisions of § 994 declare a number of congressional goals and principles, and give the Sentencing Commission both guidance and structure. They do not, however, set forth precise policy prescriptions. To the contrary, the provisions of the Act are broad in nature and express a variety of potentially conflicting goals. This approach reflects Congress's recognition of the complex, multi-faceted task it was delegating to the Sentencing Commission and the Act's broad grant of authority to the Commission.

Some examples illustrate the scope and intricacy of the Sentencing Commission's task. Congress directed the Sentencing Commission to "promote" simultaneously several of the traditional purposes of punishment: retribution, deterrence, incapacitation and rehabilitation. 28 U.S.C. § 994(f). At the same time, the Commission is directed under § 994(a) to act consistently with 18 U.S.C. § 3553, another part of the Sentencing Reform Act, which requires sentencing judges both to follow the guidelines in most cases, *id.* § 3553(b), and to impose sentences

"sufficient, but not greater than necessary, to comply with" these same purposes of punishment. *Id.* § 3553(a).

The Commission is required to pay "particular attention" to "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f). The Act sets forth factors the Sentencing Commission must consider in categorizing offenses, *id.* § 994(c), and offenders, *id.* § 994(d). The Act promotes the use of imprisonment for certain categories of repeat or violent offenders, *id.* §§ 994(h)-(j), and discourages the use of imprisonment for the purpose of rehabilitation, *id.* § 994(k), or for nonserious first offenders, *id.* § 994(j). The Act also directs the Sentencing Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . . " *Id.* § 994(g).

In order to fulfill the complex task delegated to it, the Sentencing Commission had to make numerous sensitive policy judgments, many of which required the fashioning of compromises. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (1988). The Commission had to address a variety of crucial issues on which the Act was essentially silent, such as whether to base sentences on the offense of conviction or on the defendant's "real offense." *See* Breyer, *id.*, at 8-12 (describing compromise reached); David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 422 (1993) (Congress provided "little or no statutory guidance" on this question).

In addition, the Sentencing Commission sometimes had to select between competing goals expressed in the

Act. Policies that further one goal of the Sentencing Reform Act often create tension with efforts to achieve another goal. For example, the Sentencing Commission's decision generally to require terms of imprisonment for first offenders convicted of tax and antitrust offenses, *see* USSG §§ 2T1.1, 2R1.1, may exacerbate prison overcrowding and undermine Congress's desire to discourage imprisonment for nonserious first offenders. Or, as will be discussed more fully below, basing increased sentences for repeat offenders on prosecutorial strategy decisions in individual cases would conflict with the goal of reducing unwarranted sentencing disparities. The Act gives the Sentencing Commission no guidance as to how to resolve the internal tensions within the Act on such questions.

That Congress intended the Sentencing Commission to make such subtle, sophisticated policy judgments in the guidelines' treatment of repeat offenders is evidenced by the existence of § 994(h) itself. Most significantly, Congress's intentions concerning repeat offenders are framed not as a directive to *sentencing courts*, as originally proposed, but rather as part of § 994's general policy instructions *to the Commission*. The importance of this shift in focus is illuminated by the legislative history of § 994(h). The Senate Report on the Sentencing Reform Act describes the background and rationale of § 994(h) as follows:

> Subsection (h) was added to the bill in the 98th Congress to replace a provision proposed by Senator Kennedy enacted in S. 2572, as part of proposed 18 U.S.C. 3581, that would have mandated a sentencing judge to impose a sentence at

> or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; the guidelines development process can assure consistent and rational implementation of the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 175 (1983). Congress thus consciously chose to ask the Sentencing Commission to set policies concerning repeat violent and drug offenders with all of § 994's directives in mind, recognizing and preferring that the Commission have and exercise more flexibility than would be available under a directive to sentencing courts.

Congress could have chosen to constrain the Sentencing Commission's choices more narrowly. When Congress wishes to dictate a specific sentence for a given category of offenders it can do so precisely, as it has done on many occasions. For example, Congress has adopted legislation establishing mandatory minimum terms of imprisonment, notwithstanding the sentencing guidelines, on a number of occasions. *See, e.g.*, 21 U.S.C. § 841(b), 18 U.S.C. § 924(c). Congress has also on occasion expressly directed the Sentencing Commission to make specific changes in the guidelines. *See, e.g.*, Act of Dec. 23, 1995, Pub. L. 104-71, §§ 2-4, 109 Stat. 774 (directing Sentencing Commission to increase the offense level for sexual exploitation of children). These tools were at Congress's disposal both when § 994 was enacted and when the Sentencing Commission adopted Amendment 506 and transmitted it for congressional review. Congress's

silence on both occasions plainly bespeaks the broad discretion Congress intended to vest in the Sentencing Commission in implementing § 994(h).

B. The Sentencing Commission Carefully Weighed Its Competing Obligations in Promulgating Amendment 506.

It is against this background that the Sentencing Commission drafted the career offender guideline and declared, in Amendment 506, that "offense statutory maximum" refers to the unenhanced maximum, whenever an enhancement is based on the existence of a prior conviction. In making this judgment, the Sentencing Commission had to consider not only the language of § 994(h), but also all the other provisions in § 994; indeed, the guidelines are explicitly required to be consistent with "all pertinent provisions of this title and title 18, United States Code." 28 U.S.C. § 994(a). Thus, for example, the Sentencing Commission was obliged under § 994(g) to consider the impact of a career offender guideline on prison overcrowding and under § 994(a), adopting the command of 18 U.S.C. § 3553(a), to consider whether the career offender provision would require judges to impose sentences that were "greater than necessary" to achieve the legitimate purposes of punishment. Nothing in § 994(h) suggests that the Commission is to create a "career offender" provision "notwithstanding any other provision of law," as some statutes read. *Compare* 18 U.S.C. § 3559(c)(1) ("three strikes" sentence).

The Sentencing Commission was also obliged to formulate the career offender guideline in a way that would

reduce unwarranted sentencing disparity. Reducing such disparity "among defendants with similar records who have been found guilty of similar criminal conduct," 28 U.S.C. § 991(b)(1)(B), was a cardinal goal of the Sentencing Reform Act. *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 38-39, 41-46, 49, 52 (1983). This Court has recently recognized the overriding importance of this aspect of the guidelines system: "The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. United States*, 518 U.S. --, 116 S.Ct. 2035, 135 L.Ed.2d 392, 422 (1996).

Minimization of unwarranted disparity was not only important in the initial design of the guidelines but is also of continuing concern. Judge Wilkins, former Commission Chair, has elaborated on this theme:

> No purpose was more important to Congress and the several Administrations that worked for years to enact the Sentencing Reform Act of 1984 than the avoidance of unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants. This noble goal, about which there is virtual unanimous agreement in principle, was one that Congress recognized would be constantly in tension with a changing body of sentencing law. The SRA therefore provided that the Sentencing Commission would function as a permanent, auxiliary agency in the Judicial Branch, and it mandated the Commission to amend the sentencing guidelines as necessary to promote the goal of reasonable sentencing uniformity.

William W. Wilkins & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 87 (1993). In discussing § 994(n), authorizing the Commission to amend the guidelines, the Senate Report states, "Perhaps most importantly, this provision mandates that the Commission constantly keep track of the implementation of the guidelines in order to determine whether sentencing disparity is effectively being dealt with." S. Rep. No. 98-225, 98th Cong., 1st Sess. 178 (1983). *See also* 1 U.S. Sent. Comm'n, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 161-66 (1991).

The goal of reducing unfair disparity is emphasized and restated as a mandate in another provision of § 994:

> The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

28 U.S.C. § 994(f). In § 994(f) Congress recognized that the various goals of the Act might have to be balanced in the process of designing the guidelines and directed that in doing so the Commission pay "particular attention" to the goal of reducing disparities.

The Commission identified reduction of unwarranted disparity as a principal rationale for Amendment 506. 59

Fed. Reg. 23,609 (1994); USSG, appx. C, amend. 506, *codified at* USSG § 4B1.1, comment., appl. note 2.[4] As the Commission recognizes, unwarranted sentencing disparity can arise from the exercise of judicial or prosecutorial discretion, even when that discretion is exercised in a perfectly lawful manner. The widespread existence of unwarranted sentencing disparity as a result of the exercise of lawful judicial discretion was a primary impetus for the enactment of the Sentencing Reform Act itself. In Amendment 506, as in a number of other instances,[5] the Sentencing Commission focused on the

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[4] Other rationales were also mentioned. One was a simple error, and the government, quite properly, makes nothing of it. *See* Pet. Br. 23 n.10. The other, elimination of a kind of "double counting," is more defensible. As the government admits, the Commission's construction of § 994(h) does in fact reduce the extent of the "double counting" effect. Pet. Br. 26 n.11. But whether Amendment 506 serves its stated goals effectively is not the point; that argument is addressed to the wrong audience. The issue here is this: it is for the Commission, not for the courts, to design the guidelines (including the career offender provision) in light of a balancing of all of Congress's policy objectives.

[5] For example, the Sentencing Commission recognized that one of the problems with a sentencing system principally based on the charges of conviction is that the prosecutor can greatly influence sentences through charging decisions. *See* USSG, ch. 1, pt. A(4)(a); Yellen, *supra*, 78 Minn. L. Rev. at 414-15. The "relevant conduct" guideline, USSG § 1B1.3, and the multiple count rules in chapter 3, part D, were designed, in part, to address this concern. *See* USSG, ch. 1, pt. A(4)(a). In addition, the Sentencing Commission suggested that courts should address "inappropriate manipulation of the indictment" by departing from the guidelines. *Id.*

dangers of unchecked prosecutorial discretion. The enhanced statutory maximums in 21 U.S.C. § 841(b)(1), (b)(2) and (b)(3) apply only when the government chooses to file the required information under *id.* § 851. This leads inexorably to inconsistent application of the enhancements.[6] As designed by the Commission, the

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A related problem is that a prosecutor could seek to have a sentence enhanced based on criminal conduct beyond the offense of conviction, and then later prosecute the defendant for that other conduct. *Cf. United States v. Witte*, 515 U.S. --, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) (prosecution for conduct that has already been considered in imposing sentence for a previous conviction is not double jeopardy). In such circumstances, the guidelines require a concurrent sentence. *See* USSG § 5G1.3(b).

[6] The Sentencing Commission's concern with inconsistent application of the enhancement provisions is validated by a recent study done by Commission staff. Based on a random 20% sampling of "career offender" cases from a recent two-year period, the study found that the government had sought a sentence enhancement by filing an information pursuant to 21 U.S.C. § 851 in only 2.5% of eligible cases. *See* Memorandum from Pamela G. Montgomery, Deputy General Counsel, to Chairman Conaboy, U.S. Sentencing Comm'n (Sept. 30, 1996) (copy lodged with the Clerk). *See also* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 57 (August 1991) (prosecutors usually decline to seek enhanced penalties for defendants based on existence of prior convictions). It appears then that while in some jurisdictions prosecutors rarely, if ever, rely on 21 U.S.C. § 851 to invoke the enhanced penalties against "career offenders," in other districts prosecutors seek enhancement in cases involving even relatively minor offenses. The discussion of respondent Dyer's case in text & nn. 11-13 below provides an example. This is precisely the sort of disparity that the Sentencing Commission is charged with addressing and mitigating.

career offender provision operates to reduce unwarranted disparity by ensuring an identical sentencing range for similarly situated defendants, regardless of whether the prosecutor has chosen to seek an enhanced statutory maximum.

The Act requires the Commission to design a "career offender" guideline not only in compliance with § 994(h) but also within the context of the guideline system as a whole. Accordingly, for example, the Commission makes available to career offenders the two or three level reduction for "acceptance of responsibility" that is available to any other category of offender. USSG § 4B1.1 n.*. Likewise, the Commission decided to place in the same "category" defendants whose instant offenses carry statutory maximums within a certain range – including placing all those exposed to a statutory maximum of 25 years or more, but less than life, at offense level 34, with a guideline range (before acceptance of responsibility) of 262-327 months. As a result of each of these Commission judgments, and particularly in cases where both come into play, the guideline range for many career offenders can include sentences well below the statutory maximum, however defined.

The Sentencing Commission also integrated § 4B1.1 into the structure of the rest of the guidelines in other ways that demonstrate its faithful implementation of § 994(h) within the context of the Act as a whole. A court is "encouraged" to consider departing below the guideline

range[7] pursuant to USSG § 4A1.3 (p.s.) if a defendant's career offender status over-represents the seriousness of the defendant's past criminal conduct or the risk of recidivism.[8] A court can also depart above the guideline range set by § 4B1.1 in an appropriate case. Finally, if a routine application of the guidelines yields a longer sentence than that called for by § 4B1.1, as it may, for example, in a case involving a gun-toting leader of a ring that trafficked in large quantities of drugs (and in other, less extreme cases), the longer sentence applies.[9]

By these mechanisms, the Sentencing Commission ensured a reduction, not only in unwarranted sentencing disparity, but also in unwarranted uniformity. Under the guideline as clarified by Amendment 506, a defendant who is more culpable because of factors such as a larger quantity of drugs in the offense, the use of a weapon, or a leadership role in the offense, can receive a longer guideline sentence than another offender who, although also subject to an enhanced maximum, has actually committed

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[7] This Court recently discussed "encouraged" and "discouraged" departures in *Koon v. United States*, 518 U.S. --, 135 L.Ed.2d 392, 116 S.Ct. 2035, 2045 (1996).

[8] *See, e.g., United States v. Lindia*, 82 F.3d 1154, 1164-65 (1st Cir. 1996); *United States v. Shoupe*, 35 F.3d 835 (3d Cir. 1994) (citing total of six other circuits).

[9] In each of the latter two types of cases, the prosecutor's filing of an information under 21 U.S.C. § 851 will permit a significantly longer sentence than might otherwise be authorized. The government is therefore mistaken in suggesting that the Commission's implementation of § 994(h) through Amendment 506 has the effect of nullifying an act of prosecutorial discretion authorized by Congress. *See* Pet. Br. 27-29.

a less serious offense. The government's position would force both categories of offenders to the same sentence "at or near" the enhanced maximum, seriously undercutting the Sentencing Commission's efforts at providing "certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f).

The government does not object to the integration of § 4B1.1 into the guidelines as a whole, thus implicitly recognizing the Commission's authority to exercise discretion in structuring the career offender guideline. In fact, the government has defended the Commission's discretion in formulating § 4B1.1 on other occasions. The government has supported the Commission's inclusion of conspiracy convictions within § 4B1.1's "career offender" rule, even though § 994(h), by its terms, does not cover conspiracies. (Section 994(h) cites specific statutory provisions that do not include the drug conspiracy laws, 21 U.S.C. §§ 846, 963; Pet. Appx. 114a.) *See, e.g., United States v. Hightower*, 25 F.3d 182 (3d Cir.), *cert. denied*, 115 S.Ct. 370 (1994); *United States v. Fiore*, 983 F.2d 1 (1st Cir. 1992), *cert. denied*, 507 U.S. 1024 (1993).[10]

The facts of respondent Dyer's case well illustrate the kind of disparate use of the career offender provision

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[10] Conversely, in seeming contradiction of its position in this case, the government opposes the interpretation of those Circuits which have invalidated the Commission's inclusion of conspiracy offenses within the scope of the "career offender" provision. *See, e.g., United States v. Bellazerius*, 24 F.3d 698 (5th Cir.), *cert. denied*, 115 S.Ct. 375 (1994); *United States v. Price*, 990 F.2d 1367 (D.C.Cir. 1993); see also *United States v. Mendoza-Figueroa*, 28 F.3d 766 (8th Cir. 1994), *rev'd*, 65 F.3d 691 (8th Cir. 1995) (in banc), *cert. denied*, 116 S.Ct. 939 (1996).

with which the Commission could properly be concerned. When sentenced in 1992 to serve over 20 years' imprisonment on a charge of conspiring to possess glutethemide with intent to distribute,[11] Dyer was 41 years old, with a lengthy arrest record, all related to his addiction to prescription cough medicines. PSI at 1, 6-20, 23-24. Only one of his prior convictions was for a "felony drug offense" – trafficking in glutethemide (the kind of substance to which he was addicted) in 1988, for which he served a 2½-year state sentence. PSI ¶78. This also qualified under USSG § 4B1.1 as a "career offender" drug conviction predicate. The second predicate, a so-called "crime of violence," was a nine-year-old commercial "burglary" conviction for which he had served about a year's imprisonment. PSI ¶52.[12] Yet because the prosecutor

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[11] As noted just above (text & n.10), in at least two circuits this conspiracy conviction would not even qualify as a trigger for career offender sentencing. The facts of this "conspiracy" are that respondent Dyer sold and mailed prescription pain killers from Florida to a friend in Maine who was suffering from the degenerative and fatal disease, Huntington's Chorea. The buyer, his friend, was charged and convicted as the sole co-conspirator (and was sentenced to a year's probation). Dyer PSI, at 2-3, 5; Mem. of Sent. Judgment, *U.S. v. Toppi*, Crim. No. 92-40 (D.Me.), at 2.

[12] Despite the use of this offense having been upheld on direct appeal, *United States v. Dyer*, 9 F.3d 1, 2 (1st Cir. 1993) (per curiam), this conviction was *not*, in fact and law, for a "crime of violence," as defined in USSG § 4B1.2(1). His was a commercial burglary (if it was a "burglary" at all; see *Taylor v. United States*, 495 U.S. 575 (1990), while only "burglary of a dwelling" is covered by the guideline definition, along with any offense involving "conduct that presents a serious potential risk of physical injury to another." USSG § 4B1.2(1)(ii) & appl. note 2. According to the police reports, this "burglary" consisted of

chose to file an information under § 851, the government now claims a sentence "at or near" 30 years was mandatory, rather than the sentence within a guideline range of 210-262 months that the Commission's rules would call for.[13]

The Sentencing Commission has entirely fulfilled Congress's intention that it assure that repeat offenders receive very substantial terms of imprisonment. In Respondent Dyer's case, for example, application of § 4B1.1, *including* Amendment 506, would replace an otherwise applicable sentencing range of 18-24 months with a range of 210-262 months, a more than ten-fold increase.[14] In sum, the Sentencing Commission carefully

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Dyer's entering a store that was open for business, and (finding the pharmacy department closed) using a screwdriver he picked up from a store shelf to jimmy open the door to that area, from which he picked up two bottles of cough syrup. When spotted by a store employee Dyer put the bottles and screwdriver down on a shelf and walked out.

[13] Actually, the government appears to be satisfied with the sentence of 262 months that was imposed (from a range of 262-327 months), although this is 98 months (more than eight years) shy of the 30 year maximum term triggered by the § 851 notice. How the government considers a 262-month term to be "at or near" 30 years, when it claims that a sentence chosen from a range of 210-262 months would not be, is not explained in its brief.

[14] Dyer had an offense level of 8 and was in Criminal History Category VI. Mem. of Sent. Judgment, Cr. No. 92-40 (D.Me., filed Dec. 11, 1992), at 1, 3; *see* USSG ch. 5, pt. A. Had he not failed to appear for sentencing when originally scheduled, his score could have been reduced another 2 levels for "acceptance of responsibility," USSG § 3E1.1, for a final level of 6, with a guideline range of only 12-18 months, even assuming

constructed § 4B1.1 and Amendment 506 to implement § 994(h), while complying as well with all of the other directives Congress included in the Sentencing Reform Act.

C. The Sentencing Commission's Decision to Adopt Amendment 506 Is Entitled to Great Deference.

The Sentencing Reform Act requires that the Sentencing Commission's treatment of "career offenders," reflecting a careful balancing of the policies set forth in § 994, be afforded great deference. Properly understood, the language and structure of § 994 reveal that its provisions were intended by Congress to provide an intelligible set of guiding principles to the Sentencing Commission. Section 994 does not serve as a basis for exacting judicial scrutiny of specific policy decisions reached by the Commission, much less as a justification for selective judicial revision of the guidelines in individual cases, as the government's position here implies. Put another way, while mandatory minimums and statutes increasing guideline offense levels are "rules statutes," and thus entitled to strict enforcement, § 994 is a "goals statute" that provides great autonomy to the Sentencing Commission.[15]

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no downward departure under USSG § 5K2.11 (p.s.) on account of his altruistic purpose in committing the offense. *See* note 11 *ante*.

[15] "Some statutes, to be called 'goals statutes,' announce goals and authorize delegates to promulgate controls on conduct in furtherance of those goals. 'Rules statutes,' on the other hand, state rules of conduct." David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. Rev. 740, 751 (1983).

Several factors weigh in favor of substantial judicial respect for the Sentencing Commission's judgments. First, unlike some regulatory statutes, which are born out of legislative distrust of agency discretion (*see* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 445 (1989)) the Sentencing Reform Act was enacted specifically to give substantial authority to the Sentencing Commission. Congress transferred authority to the Commission that had previously been exercised by individual sentencing judges and by Congress itself, and vested the Commission with broad discretion.[16] See generally *Mistretta v. United States*, 488 U.S. 361 (1989). Second, the concern that is sometimes expressed about deferring to agencies that both interpret and enforce the law (*see* Sunstein, *supra*, at 446) is not applicable to the Sentencing Commission, because the Commission has no enforcement authority and does not adjudicate cases.

This is not to say that Congress had no interest in the provisions the Sentencing Commission eventually adopted. To the contrary, Congress ensured that it would maintain an unusual degree of oversight over the Commission's work. Congress mandated in the Sentencing Reform Act that the initial guidelines and any subsequent amendments promulgated by the Sentencing Commission be submitted to Congress six months prior to the provisions' effective date. 28 U.S.C. § 994(p). This "report and

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[16] Indeed, the Act vests the Commission with broad power – which it has mainly declined to exercise – to "establish sentencing policies and practices for the Federal criminal justice system," 28 U.S.C. § 991(b)(1), apparently beyond the enterprise of designing and refining the sentencing guidelines.

wait" procedure was intended to enable Congress to review the Commission's work and, if appropriate, amend or override new guidelines by legislation. This Court highlighted the importance of this review period in rejecting a separation of powers challenge to the Commission in *Mistretta*, 488 U.S. at 393-94.

Congress has used its authority to oversee the Sentencing Commission's work in various ways. When the initial guidelines were promulgated in 1987, both Houses of Congress held hearings examining the proposed guidelines. See *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the H.Rep. Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987). The House of Representatives considered, but rejected, a proposal to delay the implementation of the guidelines. *See* 134 Cong. Rec. E 604 (1988) (noting rejection of bill by House of Representatives on October 6, 1987). More recently, when Congress was displeased with Sentencing Commission amendments concerning certain narcotics and money laundering offenses, Congress passed legislation, which the President signed, rejecting the Commission's proposed amendments. Act of Oct. 30, 1995, Pub. L. 104-38, 109 Stat. 334.

This is the very process Amendment 506 went through. After adopting the amendment, the Sentencing Commission submitted it to Congress on April 28, 1994, with an effective date of November 1, 1994. 59 Fed. Reg. 23,608 (1994). Although the "report and wait" procedure, by its terms, is applicable only to guidelines and not to amended commentary, the Commission chose to call Amendment 506 to Congress's attention and to offer it up for possible disapproval. Given the opportunity to review

the amendment, Congress took no action, allowing Amendment 506 to take effect as scheduled. Thus, both in general and in this specific instance, § 994(p) operates to make judicial scrutiny of Commission decisions in the context of individual cases not only inappropriate but also unnecessary.

Nor does the directive or mandatory language utilized in many of § 994's subsections suggest that these provisions are judicially enforceable in the manner presumed in the government's brief. Some clauses state that the Sentencing Commission "shall" take some action. For example, § 994(f) states that the Commission "shall promote" the traditional sentencing purposes of just punishment, deterrence, incapacitation and treatment. Subsection (g) directs the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and states that the sentencing guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . . . "

Despite the seemingly directive nature of these provisions, they have not been and should not be understood to impose narrow, specifically enforceable obligations on the Sentencing Commission. Several courts have rejected the argument that the Sentencing Commission's alleged failure to minimize prison overcrowding, even if true, entitles defendants to any form of relief, such as an invalidation of the guidelines or a departure from the guideline range. See, *e.g.*, *In re United States*, 60 F.3d 729, 733 (11th Cir. 1995) (claims that Sentencing Commission violated 28 U.S.C. §§ 994(g), (j) "have no bearing on whether the Guidelines as a whole or as applied in

McLellan's case are invalid; moreover, the claims are best brought to Congress' attention"), *cert. denied*, 116 S.Ct. 828 (1996). Rejecting a somewhat similar argument, the Tenth Circuit has also relied on the fact that § 994(g) is directed to the Sentencing Commission, not to the courts. *United States v. Ziegler*, 39 F.3d 1058, 1063 (10th Cir. 1994).[17]

Similarly, the instruction regarding the purposes of sentencing is so general and potentially self-contradictory as to yield little guidance. Nor should a court invalidate a guideline on the basis of a finding that the Sentencing Commission had failed adequately to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system," as required by § 994(o).

Subsections (c) and (d) of § 994 state that the Sentencing Commission "shall consider" and "shall" take into

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[17] Appellate courts have also rejected the argument that sentencing courts can ignore the guidelines because the recommended range calls for a sentence "greater than necessary" to comply with the purposes of punishment, in violation of § 994(a)'s mandate to design guidelines consistent with 18 U.S.C. § 3553(a). See *United States v. Deriggi*, 45 F.3d 713, 716 (2d Cir. 1995). To the extent that these cases suggest that one line of reasoning or another is unavailable as a basis for downward departure, however, they are not necessarily consistent with this Court's subsequent decision in *Koon, supra*. *See also* Gerald Bard Tjoflat, *The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel*, LV Fed.Prob., no. 4, at 4, 7 (Dec. 1991) (suggesting that counsel look to factors mentioned in § 994, to the extent *not* taken into account in the guidelines, as grounds upon which to argue for departures).

account, to the extent they are relevant, a litany of factors concerning the offense (*e.g.*, "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense") and the offender (*e.g.*, age, mental and emotional conditions, community ties). These provisions are clearly designed only to prompt Commission deliberation on those subjects, not to ensure any particular result.

A large number of provisions in § 994 state that the Sentencing Commission shall "assure," "ensure," or "insure" something. Section 994(h) is one of these. When viewed as a group, these provisions are no more specifically enforceable than the provisions just discussed. Instead, they reflect congressional guidance to the Commission but leave the Commission with significant discretion.

Section 994(e), for example, directs the Commission to "assure" that the guidelines "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" in recommending a term of imprisonment or the length of such a term. Subsection (j) also seeks to "insure" the "general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Subsection (m) tells the Commission to "insure that the guidelines reflect

the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."[18]

To read these provisions, as well as subsections (k), (l) and (n), which also use the "assure," "insure," or "ensure" language, is to see why they are not the sort of provisions to be construed narrowly or in isolation. The phrases "general appropriateness" and "general inappropriateness" are too "general" to be meaningfully enforced. Congress is expressing policy preferences, but is giving the Commission broad latitude to implement those policies. No judicial review of the Commission's compliance with these provisions can be imagined that would not do violence to the independence Congress bestowed upon the Commission.

Implementing the language of § 994 requires careful analysis and subtle policy judgments. It is precisely this type of analysis and judgment that Congress intended the Commission to exercise, subject to congressional oversight and review. For a court to say, for example, that the Commission violated subsection (j) by improperly designating tax and antitrust offenses as "otherwise serious" and generally requiring prison terms for first offenders, or that it violated the same subsection by designating almost *no* offenses as "nonserious" so as to call presumptively for probation, would represent unwarranted judicial activism and interference with the Sentencing Commission's delegated authority.

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[18] Notably, Congress did not suggest in § 994(m) whether 1983-1984 (*i.e.*, "current") sentences were thought generally to be too severe, or too lenient, or sometimes one and sometimes the other and, if so, which were which.

Section 994(h) may appear, at first, to be more specific than some of the other provisions in § 994, and thus more susceptible to close judicial scrutiny in an individual case. When § 994(h) is read in context, however, the fallacy of this view is exposed. Subsections (h), (i) and (j) each addresses circumstances under which a term of imprisonment is appropriate. Subsection (j) establishes the "general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury." Subsection (i) seeks to have the Commission recommend a "substantial term of imprisonment" for several categories of defendants. And subsection (h) refers to "a term of imprisonment at or near the maximum term authorized" for what the Commission later labelled as "career offenders."

These provisions represent different points on a continuum, from some imprisonment, to a substantial term of imprisonment, to a term of imprisonment at or near the maximum. They differ in the strength of Congress's policy preference, but not in statutory structure or the legal effect of the language employed. The mandate of subsection (h) should not be viewed as specifically enforceable by a sentencing judge any more than the equivalent provisions of subsections (j) or (i) would be. Congress was certainly expressing an intention that repeat drug or violent offenders be subject under the Guidelines to severe sentences. However, these provisions do not represent the imposition of strict or precise constraints on the Commission, and certainly do not represent directives to the sentencing judge. It is also noteworthy that when the legislative history of the Sentencing Reform Act is consulted, the line between subsections (h),

(i) and (j) is further blurred. In discussing § 994(h), the Senate Report refers to "the Committee's view that *substantial* prison terms should be imposed on repeat violent offenders and repeat drug traffickers," S. Rep. 98-225, 98th Cong., 1st Sess. 175 (1983) (emphasis added), thus repeating the language from subsection (i) and apparently equating it with the substance of the mandate of subsection (h).

This Court recently recognized the Sentencing Commission's authority to exercise its discretion in implementing § 994(h). *Stinson v. United States*, 508 U.S. 36 (1993). Like this case, *Stinson* involved a Sentencing Commission interpretation of § 994(h) implemented through an amendment to guideline commentary. At issue in *Stinson* was the effect of Amendment 433, which amended the commentary to § 4B1.2 to state that the term "crime of violence," as used in § 4B1.1, does not include the offense of unlawful possession of a firearm by a felon. This Court concluded that:

> the commentary is a binding interpretation of the phrase "crime of violence." Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision of USSG § 4B1.1 as to those defendants to whom Amendment 433 applies.

508 U.S. at 47.

Of course, the phrase "crime of violence" used in § 4B1.1 and defined in § 4B1.2 comes directly from § 994(h). It is part of the same "directive" to the Sentencing Commission as the phrase "at or near the maximum term." In defining "crime of violence," the Sentencing

Commission was limiting the potential reach of § 994(h). Notably, in upholding this action, this Court in *Stinson* did not independently construe § 994(h) to determine the intended meaning of "crime of violence." Instead, the Court deemed conclusive the Sentencing Commission's definition. *Stinson* firmly supports the Sentencing Commission's authority to determine how best to implement the policies expressed in § 994, and particularly to do so through its implementation of § 994(h).[19]

There is no indication that Congress intended to impose close judicial scrutiny on the Sentencing Commission's policy judgments and implementation of the Sentencing Reform Act. To the contrary, Congress intended to insulate the Sentencing Commission, to the extent possible, not only from political considerations, *see* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Calif. L. Rev. 1, 5, 7-16 (1991) ("The Commission is less politically accountable than virtually any other federal

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[19] The statement in *Stinson* that guideline commentary is binding unless it "violate[s] the Constitution or a federal statute," 508 U.S. at 45, is not inconsistent with this analysis. Of course, commentary, like a guideline, that conflicts with a statute is invalid. If a guideline called for probation for an offender convicted of an offense to which a mandatory minimum term of imprisonment was applicable, or for which probation was otherwise excluded by statute, the court would be required to ignore the guideline. The question in this case, though, is a different one: whether the Sentencing Commission's policy judgment in implementing Section 994(h) is a valid exercise of its discretion. Amendment 506 does not "violate . . . a federal statute" in the sense reserved in *Stinson*.

agency."), but also from distracting litigation. The legislative history of § 994 demonstrates that Congress intended that the Sentencing Commission's resolution of the multitude of tasks it faced under § 994 not be subject to judicial second-guessing. The Judiciary Committee's Report states:

> It is also not intended that the guidelines be subject to appellate review under chapter 7 of title 5. There is ample provision for review of the guidelines by the Congress and the public; no additional review of the guidelines as a whole is either necessary or desirable.

S. Rep. No. 98-225, 98th Cong., 1st Sess. 181 (1983).

Several lower courts have cited this portion of the legislative history to support denials of judicial review of aspects of the Sentencing Commission's rulemaking process. *See, e.g., United States v. Cooper,* 35 F.3d 1248, 1254-55 (8th Cir. 1994); *United States v. Lopez,* 938 F.2d 1293, 1297 (D.C.Cir. 1991).[20] Congress also demonstrated its

[20] Also relevant is the Sentencing Act of 1987, in which Congress amended the provision of the Sentencing Reform Act dealing with departures from the guidelines, 18 U.S.C. § 3553(b), adding the following sentence: "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements and official commentary of the Sentencing Commission." The purpose of this provision is to protect the Sentencing Commission's work from undue judicial scrutiny, such as the burden of Commissioners would face if called to testify in sentencing proceedings around the country to explain the guidelines' resolution of various issues. *See* 133 Cong. Rec. S16647 (1987) (remarks of Sen. Thurmond); 133 Cong. Rec. H10017 (1987) (remarks of Rep. Conyers).

commitment to the Sentencing Commission's protection from excessive judicial scrutiny when it "granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u)." *United States v. Braxton,* 500 U.S. 344, 348 (1991).

Although basing its case on an application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the government ignores the language in that case explaining that courts will defer to an agency's implementation of a statute when Congress has explicitly or implicitly delegated such authority. As the Court stated in *Chevron*:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 843-44. Thus, "[t]he Commission's exercise of delegated authority is normally lawful as long as it is reasonable." *Melendez v. United States,* 518 U.S. --, 116 S.Ct. 2057, 135 L.Ed.2d 427, 442 (1996) (Breyer, J., with O'Connor, J., concurring and dissenting, citing *United States v. Shabazz,* 933 F.2d 1029, 1035 (D.C. Cir.) (Thomas,

J.), *cert. denied*, 502 U.S. 964 (1991) (applying *Chevron* to uphold challenged sentencing guideline on this basis)).

Chevron's meaning in the present context, as explained by a leading authority on administrative law, is that "When Congress enacts a statute to be administered by an agency, it has delegated to the agency resolution of all policy disputes that arise under that statute that Congress did not itself resolve." 1 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise ¶3.3, at 114 (3d ed. 1994). Or, as Professor Sunstein has written, according to *Chevron*, "the resolution of ambiguities in statutes is sometimes a question of policy as much as it is one of law, narrowly understood, and that agencies are uniquely well situated to make the relevant policy decisions." Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2086 (1990). This is especially true of the Sentencing Commission, to which Congress recognized it had delegated "extraordinary powers and responsibilities." S.Rep. No. 225, 98th Cong., 2d Sess. 160 (1983).

This Court's unreviewability decisions under the "committed to agency discretion" clause of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2), also support the conclusion that the Sentencing Commission's implementation of the policies set forth in § 994 is entitled to great deference. Although as noted above, the judicial review provisions of the APA do not apply to the Sentencing Commission,[21] the logic behind this Court's decisions in this area supports a similar principle here. As

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[21] *Compare* 28 U.S.C. § 994(x) ("notice and comment" rulemaking procedures of the APA, codified at 5 U.S.C. § 553, apply to Sentencing Commission).

this Court discussed in *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), "review is not to be had" in those cases in which the relevant statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." The Court thus held unreviewable an agency's decision not to institute enforcement proceedings. *Id.* at 831.

Likewise, in *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Indian Health Services, an agency within the Department of Health and Human Services, canceled a program that had provided clinical services to handicapped Indian children in the Southwest. This Court deemed the cancellation to be "committed to agency discretion" and therefore not subject to judicial review. The program had been funded from the agency's lump-sum appropriation. The Court noted that "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 192. This is the same purpose underlying the broad congressional grant of authority to the Sentencing Commission. See also *Webster v. Doe*, 486 U.S. 592 (1988) (no judicial review of decision by Director of Central Intelligence to terminate employee in the interests of national security); *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (no judicial review of agency's refusal to reconsider action because of material error).

The Court in *Heckler v. Chaney* elaborated the rationale for unreviewability in a way that resonates clearly in this case. As the Court explained, judicial review is inappropriate when an agency has engaged in "a complicated

balancing of a number of factors which are peculiarly within its expertise." *Heckler*, 470 U.S. at 831. This is so because the "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32. This is precisely the situation raised by the Sentencing Commission's promulgation of the career offender guideline and Amendment 506. The Sentencing Commission sought to balance a series of complicated factors, namely the various considerations Congress set forth in § 994's provisions. The Sentencing Commission engaged in this task with sensitivity and care, exercising the expertise that Congress anticipated when it established the Commission. As a result, the Sentencing Commission's implementation of Congress's goals expressed in § 994, including the adoption of Amendment 506, is not subject to judicial second-guessing.

Congress delegated to the Sentencing Commission the responsibility to implement and harmonize the diverse provisions of § 994. A Sentencing Commission decision, made after careful reflection on all of the provisions of the Sentencing Reform Act, should not be judicially disturbed if it is "within the bounds of reasoned decisionmaking." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983). It is not necessary in this case, in order to affirm the judgment below, to hold that a court could never invalidate a guideline for failing to comply with a provision contained in § 994.[22] However, a court should not declare any

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[22] Arguably a guideline promulgated in violation of the basic procedural requirements set forth in Section 994 would properly be subject to judicial invalidation. Section 994(a) requires that the affirmative votes of at least four members of the Commission are necessary to adopt or amend guidelines, policy statements, or commentary. Section 994(p) mandates that guidelines or amendments to the guidelines promulgated by the Sentencing Commission be submitted to Congress by May 1, and that such guidelines or amendments may not take effect before Congress has had six months to review the proposals. These provisions do not relate to policy judgments to be made by the Commission.

particular provision of the guidelines invalid where the Commission's design of that section can be defended as reflecting a fair reading and implementation of *all* of the directives in § 994.

D. The Sentencing Commission's Adoption of Amendment 506 Represents a Reasonable Exercise of the Commission's Policy Judgment.

Viewed in the full context of the Commission's task of developing the guidelines, the career offender provision, including Amendment 506, rests well "within the bounds of reasoned decisionmaking," *Baltimore Gas & Electric v. NRDC, supra*, and is therefore valid. The Sentencing Commission carefully prioritized and scrupulously implemented the congressional goals contained in § 994(h) and the other provisions in § 994. The Commission "assured" severe sentences for repeat offenders, while pursuing the overarching goal of reducing unwarranted disparity.

In respondent Hunnewell's case, for example, his actual criminal conduct would have resulted in an offense level of 13, less 2 for "acceptance of responsibility," USSG

§ 3E1.1, for a total of 11, with a resulting guideline range at Criminal History Category VI of 27-33 months. PSI at 7-9, 21. The filing of an information under 21 U.S.C. § 851 drove his maximum statutory sentence up to 30 years, and he was initially sentenced as a "career offender," based on two prior state drug felonies, at Level 31 (34 less 3 for acceptance). The term imposed, 188 months (from a range of 188 to 235 months[23]), is a six-to-seven-fold increase over the ordinary guideline sentence deemed appropriate for his offense, even considering the substantial prior record. Based on USSG § 4B1.1 after its clarification by Amendment 506, the "career offender" level would be 32. Assuming the same 3-level reduction, the resulting sentence at level 29 would come from a range of 151-188 months. Thus, any sentence imposed under the regime of Amendment 506 would exceed 12½ years and could be the same as that previously given.[24] The

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[23] This is the range advocated by the government, apparently on the basis that these sentences, ranging from 52% to 65% of the enhanced, 30-year statutory cap, are "at or near" that maximum, while a range two levels lower is not.

[24] Similarly, with respect to respondent LaBonte, the base offense level was 14. Less two levels for acceptance of responsibility, his guideline range at Criminal History Category IV would have been 21-27 months. Undisputed Findings Affecting Sent., at 1, *U.S. v. LaBonte*, Cr. No. 92-69 (D.Me.); Judgment Exh. A, *id.* As a career offender facing an *enhanced* statutory maximum of 30 years based on the § 851 filing (his predicate offenses being two prior state drug convictions), the range instead was held to be 188-235 months. (He was sentenced to serve 188 months – 52% of the enhanced maximum, the same as Hunnewell.) His sentence was subsequently reduced under 18 U.S.C. § 3582(c)(2), on the basis of Amendment 506, to 151 months, based on a career offender

challenged amendment allows an incremental benefit at best for his category of defendant.

As this Court has recognized, "Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred direction." *Rosado v. Wyman*, 397 U.S. 397, 413 (1970). Although the government now challenges the wisdom of the Commission's approach, it is precisely the approach Congress mandated in § 994. The Sentencing Commission faithfully and reasonably fulfilled its responsibilities under § 994, including § 994(h), in adopting Amendment 506.

II. AMENDMENT 506 IS VALID UNDER THE TWO-PART *CHEVRON* TEST MANDATING JUDICIAL DEFERENCE TO AN AGENCY'S PERMISSIBLE CONSTRUCTION OF THE STATUTE IT IS CHARGED WITH IMPLEMENTING.

The court of appeals in this case upheld the validity of Amendment 506 based on an application of the two-part test derived from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the government attacks the First Circuit's judgment solely on the basis of a *Chevron* analysis.[25] As discussed under

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range at level 32, less 3 for acceptance, of 151-188. Pet. Appx. 7a-8a.

[25] As this Court stated in *Chevron*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two

Point I of this Brief, a proper application of *Chevron* in this case focuses not on the two-part test, but on the affirmative delegation of authority to the Sentencing Commission. By virtue of that broad delegation, the Commission's definition of "offense statutory maximum" is valid simply because it is not unreasonable. At the same time, Amendment 506 is also fully sustainable under the two-part *Chevron* test. Under that test, because Congress's intent in § 994(h) is not entirely clear, and because the Sentencing Commission's understanding of that provision is "permissible" (*Chevron*, 467 U.S. at 843), Amendment 506 is valid.

A. Congress Has Not "Directly Addressed the Precise Question at Issue," that is, Whether the Sentencing Commission Must Base the Career Offender Guideline on Enhanced Statutory Maximum Sentences.

The first question under the *Chevron* test, whether the statutory provision at issue is free from any ambiguity, must be answered in the negative. Section 994(h) provides that "The Commission shall assure that the guidelines specify a term of imprisonment at or near the

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> questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the . . . question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43.

maximum term authorized for categories of defendants in which the defendant is eighteen years old or older" and 1) the defendant stands convicted of a felony that is a crime of violence or a specified controlled substance offense; and 2) the defendant has at least two prior felony convictions for a crime of violence or a specified controlled substance offense. Contrary to the government's argument, the quoted language, properly read, is subject to more than one plausible interpretation. As Justice Scalia has observed:

> If *Chevron* is to have any meaning, then, congressional intent must be regarded as "ambiguous" not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 520 (1989). Viewed in this light, the language of § 994(h) is not free from ambiguity.

This Court recently found ambiguity in a statutory provision remarkably similar to § 994(h). At issue in *United States v. R.L.C.*, 503 U.S. 291 (1992), was the meaning of 18 U.S.C. § 5037(c), which provides that the term of detention imposed on a youth found to be a juvenile delinquent may be no longer than "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." The dispute in *R.L.C.* centered on whether the quoted language refers to the statutory maximum adult sentence, or to the top of the guideline range that would have been applicable (absent facts warranting an upward departure) were the

juvenile an adult. The government's position was that § 5037(c) unambiguously refers to the statutory maximum. This Court disagreed, holding that under plain meaning analysis, either interpretation is tenable. 503 U.S. at 297.[26]

The decision in *R.L.C.* establishes that the meaning of "maximum" is not self-evident or unambiguous. This Court has long recognized that the "meaning [of words] well may vary to meet the purposes of the law." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). The petitioner's half-hearted attempt to distinguish *R.L.C.* is unavailing. The government contends that it "would be entirely circular to suggest that the Commission had complied with § 994(h) simply by prescribing sentences 'at or near' the top of the Guidelines range." Pet. Br. 19 n.7. Whether or not that statement is correct, the issue in this case is not whether the Commission could deem "at or near the maximum" to mean at or near the top of the guideline range. Rather, the issue is whether § 994(h) *unambiguously* requires the Sentencing Commission to base the career offender guideline on enhanced statutory maximums which are based on the same prior offenses which trigger the guideline, but which come into play only when the prosecutor in a given case elects to file an information under 21 U.S.C. § 851. The government completely fails to explain how,

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[26] The Court went on to examine the legislative history of the statute, resolving the ambiguity in favor of the interpretation incorporating the applicable guideline range. 503 U.S. at 297-305. Finally, the Court concluded that even if an ambiguity persisted, the rule of lenity would compel "the construction yielding the shorter sentence." *Id.* at 305.

after deeming the phrase "the maximum term of imprisonment that would be authorized" to be ambiguous in *R.L.C.*, this Court could find the phrase "a term of imprisonment at or near the maximum term authorized" to be free from ambiguity. In fact, § 994(h) is equally ambiguous.[27]

The court of appeals in this case identified another source of ambiguity in § 994(h): the relationship between the phrase "maximum term of imprisonment" and the phrase "categories of defendants." Pet. Appx. 14a-24a. The meaning of "maximum" depends upon a construction of "categories." Categories, in this context, can have at least two meanings. One interpretation is that the applicable category of defendants is that group of defendants who have committed similar offenses and against whom the government has sought sentence enhancements. The language of § 994(h), however, suggests that an equally plausible reading is that the applicable category of defendants is all defendants who have committed the same offense and who have the two required prior felony convictions, regardless of whether the government has filed notice of its contention that an enhanced maximum sentence applies.

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[27] See also *United States v. Granderson*, 511 U.S. 39 (1994) ("original sentence," as used in 18 U.S.C. § 3565(a), refers not to the sentence actually imposed on a defendant, but rather to the maximum of the range of imprisonment authorized by the sentencing guidelines). Here, too, a narrowly literal reading of a phrase ("original sentence") does not make sense in the overall context of the legislation.

A sentence "at or near the maximum authorized" under this latter view would refer to the unenhanced maximum. The unenhanced maximum is, in fact, the "maximum term authorized" for the category of defendants who (1) have been convicted of a crime of violence or a narcotics trafficking offense and (2) have at least two prior convictions for such offenses. This is the applicable "category" identified by § 994(h). There are subsets of this category, defendants who are eligible for enhanced maximums and against whom the government has opted to seek such enhancements, who face higher maximum terms of imprisonment *as individuals*. But the *category* designated by § 994(h) is naturally, or at least reasonably, read to include all defendants described in the provision.

The government attempts to demonstrate that there is no ambiguity by contending that the maximum term authorized "is not changed by the government's omission to file the procedural notice required by Section 851(a)(1) in a particular case. . . . " Pet. Br. 21. This is incorrect. A sentence is only "authorized" if the government has charged the defendant in a way which enables the court to impose that sentence. A sentence pursuant to 21 U.S.C. § 841(b) is not "authorized" for an offender convicted of simple possession of a controlled substance under 21 U.S.C. § 844(a), even if the court believes that the defendant actually trafficked in the controlled substance, nor is an enhanced maximum sentence for distribution within a thousand feet of a school "authorized" unless the offense is charged under *id.* § 860. Indeed, the holding and entire rationale of *R.L.C., supra*, refute the government's argument in this regard. For the same reasons, an enhanced

statutory maximum is not "authorized" for the "category" of repeat offenders which includes defendants against whom the government has not filed the required notice.

The government's suggestion in this regard proves too much. If the maximum sentence "authorized" for a recidivist drug law violator does not depend on the filing of a § 851 information, then every case involving a repeat drug offender must be subject to career offender sentencing that is measured by the enhanced maximum. No court has ever adopted that reading of the statute and guideline, the government did not advance that reading of the statute below (indeed, the government does not appear ever to have proposed that reading of the statute previously in any case in any court), and there is no reason at all to suppose that it reflects congressional intent.

The government's reading would effectively rewrite § 994(h) to say that "The Commission shall assure that the guidelines specify a term of imprisonment at or near the maximum authorized *for any defendant* who is eighteen years old or older and. . . . " This reading eviscerates the phrase "categories of defendants" and violates the principle that courts will construe a statute so as to give effect, if possible, to each word or phrase. *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994); *Penna. Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Potter v. United States*, 155 U.S. 438, 446 (1894).

The reference in § 994(h) to "categories" of defendants reflects a significant and recurring theme in the

Sentencing Reform Act. In a variety of provisions Congress instructed the Commission to develop guidelines not for individual defendants, but for categories of defendants. *See* 18 U.S.C. § 3553(a)(4); 28 U.S.C. §§ 994(b)(1), 994(d) and 994(i). The legislative history further demonstrates that the use of "categories" in § 994(h) is critical to its meaning and not some sort of superfluity:

> The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by *all categories of offenders* consistently. This approach will *eliminate specialized sentencing statutes that cover narrow classes of offenders*. . . .

S.Rep. No. 225, 98th Cong., 2d Sess. 51 (1983) (emphasis added; footnote omitted). The focus in § 4B1.1 on categories of defendants, rather than on individuals, is also in keeping with Congress's goal of "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. § 994(f); see also *id.* § 991(b)(1)(B).

Just as the language of § 994(h) is not free from ambiguity, so, too, the structure of the Sentencing Reform Act does not reveal any congressional intention that § 994(h) require the Sentencing Commission to base career offender sentences on enhanced maximum sentences. The government's theory of this case is tied to a single phrase in § 994(h) read almost entirely out of context. That approach violates the venerable principle that in interpreting a statute, the Court will not be guided by a single sentence or part of a sentence, but rather will "look to the provisions of the whole law, and to its object and policy." *U.S. National Bank of Oregon v. Independent*

Insurance Agents of America, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 8 How. (49 U.S.) 113, 122 (1849)). Accord, *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 19 How. (60 U.S.) 183, 194 (1857)).

As fully explored in Point I of this Brief, the Sentencing Reform Act expresses Congress's intention that the Sentencing Commission exercise judgment in implementing the many directives contained in the Act. Section 994's unexplained, alternating use of the seemingly synonymous terms "assure," "insure" and "ensure" itself helps demonstrate that § 994 is a general roadmap but not a detailed blueprint for a new sentencing system. Instead, § 994 reads like the delicate political compromise it was, flowing from the pens of many authors, resulting in occasional inconsistency and ambiguity. Similarly, the legislative history, while silent on the precise question at issue, supports the conclusion reached by the court of appeals below.

It is not clear, then, whether Congress intended "at or near the maximum term authorized" to refer to the unenhanced or enhanced statutory maximum term of imprisonment.[28] At least, the intended meanings of "maximum term of imprisonment" and the phrase "categories

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[28] In fact, despite the government's protestations, Pet.Br. at 19 n.7, it is not clear that Congress necessarily precluded the Sentencing Commission from interpreting that phrase to refer to the maximum of the applicable guideline range. When the "offense statutory maximum," however defined, is 30 years (360 months), the "career offender" sentencing range under § 4B1.1 is 262-327 months. A judge could therefore impose a "career offender" guideline sentence – regardless of which side prevails in the case now before the Court – that would still be 65 months

of defendants," as used in § 994(h), are not clear.[29] Because Congress has not expressed its intent unambiguously in § 994(h), the second part of the *Chevron* test must be applied.

B. The Sentencing Commission's Interpretation of § 994(h) Is Reasonable.

The career offender guideline, as clarified by Amendment 506, must be sustained. The government does not even contend that Amendment 506 is invalid if § 994(h) is at all ambiguous. Indeed, as detailed in Point I of this Brief, Amendment 506 is eminently reasonable. The Sentencing Commission assured severe sentences for repeat

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(more than five years) below the maximum authorized under the guideline. The Sentencing Commission could have interpreted § 994(h)'s direction that the guidelines call for a sentence "at or near the maximum term authorized," simply to require that the career offender guideline not permit a sentence that far below the top of the range. Of course, no such interpretation is before the Court, but this possible construction does suggest further ambiguity in § 994(h).

[29] If this criminal case did not also involve the action of an administrative agency within the realm of its delegated authority, the Court might look, in the end, to the rule of lenity. See *Bifulco v. United States*, 447 U.S. 381 (1980); *Busic v. United States*, 446 U.S. 398, 406-07 (1980). This Court has never considered how it would resolve a case in which *Chevron* dictated a different result from that suggested by the rule of lenity, nor should it do so here. In this case, the two modes of analysis lead to the same conclusion. *Cf. United States v. R.L.C.*, 503 U.S. 291, 307-08 (1992) (Scalia, J., concurring in the judgment, with Kennedy & Thomas, JJ.) (legislative history should not be invoked to defeat operation of rule of lenity).

offenders, while reducing unwarranted sentencing disparity, lessening the effect of the career offender provision on prison overcrowding, and while complying with the many other directives in § 994. Consequently, under *Chevron*, Amendment 506 is valid, and the judgment of the court of appeals must be affirmed.

III. IF THIS COURT REVERSES THE COURT OF APPEALS, THE CASES SHOULD BE REMANDED FOR RESENTENCING PURSUANT TO 18 U.S.C. § 3553(b).

Amendment 506 does not stand alone. Under *Stinson v. United States*, 508 U.S. 36 (1993), the commentary incorporating that amendment is the Sentencing Commission's authoritative statement of the meaning and intent of USSG § 4B1.1. Thus, § 4B1.1 mandates that the offense level under that guideline be determined based on an offender's unenhanced statutory maximum. If this Court reverses the court of appeals, it will be holding that, at least as applied to offenders subject to enhanced maximums, the guideline, not simply the amended definitional commentary, is invalid.

With no valid guideline in place, respondents would be entitled to be resentenced under the provision of the Sentencing Reform Act which provides, in pertinent part:

> In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of

> the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(b). Under this provision, the net result would probably be a sentence in compliance with Amendment 506, as written, or a downward departure therefrom under USSG § 4A1.3 (p.s.). That decision would have to be made by the district court, after hearing appropriate arguments of counsel and allocution of the respondents.

Therefore, if the judgment below is reversed, a remand for resentencing pursuant to § 3553(b) would be necessary.

CONCLUSION

For all of these reasons, Amendment 506 must not be judicially invalidated. The judgment of the United States Court of Appeals for the First Circuit should be affirmed. Respondent LaBonte's sentence should be affirmed, while the cases of Respondents Dyer and Hunnewell should be remanded for possible resentencing.

Respectfully submitted,

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October 4, 1996.

(6)

No. 95-1726

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents offer two principal defenses of the Sentencing Commission's determination in Amendment 506 that the maximum term of imprisonment to be used in sentencing under the Career Offender Guideline means the maximum term without including increases in that term based on the defendant's prior criminal record. First, respondents argue (Resp. Br. 20-35) that if the Commission's approach can be explained as a reasonable implementation of the Sentencing Reform Act as a whole, "that guideline is not subject to judicial invalidation" (Resp. Br. 2), even, apparently, if it squarely conflicts with spe-

cific and unambiguous language in 28 U.S.C. 994(h). Second, respondents argue (Resp. Br. 37-47) that if it is proper for courts to inquire whether the Commission has violated a specific statutory requirement, Section 994(h) is "not free from ambiguity" on the issue of whether the unenhanced statutory maximum term of imprisonment is the "maximum term authorized." Neither contention has merit. The first contention would accord the Sentencing Commission untrammeled freedom to disregard clear congressional mandates without any meaningful judicial check. The second contention finds no support in the language of Section 994(h), which clearly requires the Commission to specify sentences "at or near the maximum term authorized," *i.e.*, the enhanced maximum term for repeat offenders.[1]

1. In our opening brief we argued that, with respect to defendants who are subject to an enhanced statutory maximum term of imprisonment based on their prior convictions, the phrase "maximum term authorized" in Section 994(h) clearly and unambiguously refers to the enhanced maximum. Respondents' central submission is that the Court need not answer that question, because Congress expected the Commission to implement Section 994(h) "not in isolation but rather in the full context of the Sentencing Reform Act's many interrelated goals." Resp. Br. 5; see also *id.* at 15 ("The Act requires the Commission to

[1] Since the filing of our opening brief, two more courts of appeals have determined that the Commission's commentary to the Career Offender Guideline conflicts with the mandate of 28 U.S.C. 994(h) and is invalid. *United States* v. *McQuilkin*, No. 95-2092, 1996 WL 589190 (3d Cir. Oct. 15, 1996); *United States* v. *Branham*, Nos. 95-5213, 95-5241, 95-5357 & 95-5490, 1996 WL 563612 (6th Cir. Oct. 4, 1996).

design a 'career offender' guideline not only in compliance with § 994(h) but also within the context of the guideline system as a whole."). Accordingly, respondents argue, the commentary to the career offender provision at issue here may not be declared invalid if "the Commission's design of that section can be defended as reflecting a fair reading and implementation of *all* of the directives in § 994," Resp. Br. 35, even if the result is a guideline that prevents offenders subject to that Guideline from receiving sentences "at or near the [statutory] maximum terms authorized" for them.

a. Respondents' approach to judicial review of the Commission's action is unsound. The Sentencing Commission does, of course, have wide discretion to formulate sentencing guidelines and to balance competing statutory goals and objectives. *Mistretta* v. *United States*, 488 U.S. 361, 377 (1989). But this Court's cases afford no support for respondents' claim that the courts cannot review any particular Commission guidelines or commentary for compliance with clear and specific statutory directives.[2] Even respondents' amici "do not take the position, proposed by respondents, that the mandates contained in § 994 are, essentially, nonjusticiable." National Association of Criminal Defense Lawyers, et al., Br. 8 n.5.

[2] Respondents state (Resp. Br. 34) that the Court need not hold that a guideline could never be invalidated for violation of a particular provision in Section 994. But the only example of possible judicial review respondents suggest (Resp. Br. 34 n.22) is a violation of Section 994's *procedural* requirements. Respondents leave no room for a court to hold that a Commission guideline squarely conflicts with *substantive* requirements of Section 994.

Respondents rely (Resp. Br. 32) on cases holding that, under the Administrative Procedure Act, judicial review of agency action is not available when the applicable statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985); see also, *e.g.*, *Lincoln* v. *Vigil*, 508 U.S. 182 (1993) (agency's allocation of lump-sum appropriation); *Webster* v. *Doe*, 486 U.S. 592 (1987) (CIA's termination of employee in the interest of national security). Those cases, however, do not hold that a clear, direct, and specific statutory provision is not subject to judicial enforcement because the administering agency generally has discretion in implementing a statutory regime. To the contrary, the presumption in our system is that, while agencies may be entrusted with wide discretion, an agency's violation of an unambiguous statutory command is subject to judicial review. See *McNary* v. *Haitian Refugee Center*, 498 U.S. 479, 496 (1991); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986).[3] In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court made clear that the Sentencing Commission is no exception; the Court noted that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless" it conflicts with the guideline itself or

[3] See *Michigan Academy*, 476 U.S. at 671, quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1946) ("Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.").

"violates the Constitution or a federal statute." *Id.* at 38.[4]

Here, Section 994(h) does not simply give the Commission guidance about general policies it is to further in concert with other statutory aims. Rather, Section 994(h) sets forth a requirement about the sentences that the Guidelines "shall" specify for the identified career offenders. "Congress directed that the guidelines require a term of confinement at or near the statutory maximum for certain crimes of violence and for drug offenses, particularly when committed by recidivists. § 994(h)." *Mistretta*, 488 U.S. at 376. The issue in this case, therefore, does not call for "judicial second-guessing" (Resp. Br. 34) of the Commission's resolution of policy questions. It requires instead a determination of whether the Commission, by prescribing sentences for career offenders at or near statutory maximum terms that do not include recidivist enhancements, has complied with the mandate of Section 994(h) to "specify a sentence

[4] *Stinson* involved amended commentary to Guidelines § 4B1.2 making clear that possession of a firearm by a convicted felon is not to be treated as a "crime of violence" for purposes of the Career Offender Guideline. The Court upheld the amended commentary as a valid exercise of the Commission's authority. 508 U.S. at 47. Contrary to respondents' contention, however, the Court did not "deem[] conclusive the Sentencing Commission's definition" of the term "crime of violence." Resp. Br. 29. Rather, the Court concluded that the amended commentary "does not run afoul of the Constitution or a federal statute." 508 U.S. at 47. That statement was consistent with the government's concession that "the commentary does not conflict with the text of the Guidelines, nor is it contrary to any statute or provision of the Constitution." 91-8685 Gov't Br. at 18-19.

to a term of imprisonment at or near the maximum term authorized."

Respondents characterize Amendment 506 as a legitimate exercise of the Commission's authority "to resolve the internal tensions within the [Sentencing Reform] Act." Resp. Br. 8. But the Commission's latitude to implement the polices of the Act cannot justify the Commission's selection, as a baseline for application of the Career Offender Guideline's "maximum term" requirement, a prison term that is not in fact the "maximum." That is not a policy decision that Congress entrusted the Commission to make. Nor is it relevant to this case that the Commission has significant discretion to determine, with regard to a given statutory maximum, what range of penalties fall "at or near" that maximum. Respondents observe that we have not raised any issue in this case about the boundaries placed on the Commission's interpretation of the "at or near" requirement. See Resp. Br. 19 n.13, 36 n.23. That is because "[t]he issue here is not how close the sentence must be to the statutory maximum, but to which statutory maximum it must be close." *United States* v. *Fountain*, 83 F.3d 946, 952 (8th Cir. 1996), petition for cert. pending, No. 96-6001; *United States* v. *Hernandez*, 79 F.3d 584, 599 (7th Cir. 1996), petitions for cert. pending, Nos. 95-8469 & 95-9335 ("[T]he question presented by Amendment 506 is not how close the offense level and resulting sentencing range must be to the statutory maximum. * * * The debate instead is over which statutory maximum the Commission is to aim for.").[5]

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[5] Nor it is relevant that the Commission has discretion to conclude that drug conspiracy career offenders should be sentenced under the Career Offender Guideline even though Section 994(h) refers only to substantive drug offenses. See Guidelines § 4B1.2 (Application Note 1). As respondents point out (Resp. Br. 17 n.10), two courts of appeals initially held invalid the Commission's inclusion of drug conspiracy offenses within the Career Offender Guideline. See *United States* v. *Bellazerius*, 24 F.3d 698 (5th Cir.), cert. denied, 115 S. Ct. 375 (1994); *United States* v. *Price*, 990 F.2d 1367 (D.C. Cir. 1993). Those courts concluded that the Commission had based its decision on the mistaken belief that drug conspiracy offenses were among the crimes enumerated in Section 994(h). See *Bellazerius*, 24 F.3d at 702; *Price*, 990 F.2d at 1369. Both courts acknowledged, however, that other provisions of the Sentencing Reform Act might well empower the Commission to treat conspiracy offenses, for purposes of the Career Offender Guideline, as equivalent to the underlying crimes. See *Bellazerius*, 24 F.3d at 702 ("Pursuant to its authority under [28 U.S.C.] 994(a)-(f), the Commission could have conducted an analysis that found that certain offenders outside the reach of section 994(h) warranted the same punishment as section 994(h) career offenders."); *Price*, 990 F.2d at 1369 ("the Commission may well be free under § 994(a) to specify equally long terms for defendants not covered by § 994(h)"). The Commission has since amended the commentary to Guidelines § 4B1.1 to make clear that its definition of "career offender" rests upon "its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f)" as well as on Section 994(h). See Guidelines App. C, Amend. 528. The Commission's power to *add* to the coverage of the Career Offender Guideline, however, offers no support for respondents' view that the Commission, on policy grounds, may permissibly depart from Section 994(h)'s requirement of sentences at or near "maximum" terms.

b. Even taken on respondents' own terms, Amendment 506 cannot be defended as a reasonable reconciliation of competing congressional policies. The purpose and effect of Amendment 506 is to produce Guidelines ranges "at or near" an "offense statutory maximum" that is *lower* than the actual "maximum term authorized" by Congress for recidivists such as

respondents. The amendment thus "effectively nullifies the criminal history enhancements carefully enacted in statutes like 21 U.S.C. § 841." Pet. App. 40a (Stahl, J., dissenting). Respondents cannot plausibly assert the existence of a statutory or public policy favoring leniency towards repeat drug offenders. To the contrary, Amendment 506 subverts congressional policy by virtually eliminating the government's ability to invoke the enhanced statutory maximum sentences in *any* case, despite Section 994(h)'s directive that career offenders be sentenced "at or near" those maximum terms.

Respondents place primary emphasis on the Commission's statutory obligation to provide "certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities." 28 U.S.C. 994(f); see Resp. Br. 13-14, 17, 35. Respondents thus invoke the Commission's rationale that Amendment 506 will serve to "avoid[] * * * unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." 59 Fed. Reg. 23,609 (1994). As we explain in our opening brief (see Gov't Br. 5 n.1, 21 n.9, 27-28), those disparities cannot be viewed as "unwarranted." The enhanced statutory maximum penalties applicable to recidivist narcotics offenders may be imposed only if "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a)(1). The disparity between the maximum penalties for defendants who do and do not receive the requisite notice is the direct and necessary consequence of that statutory requirement.

"The disparities in the sentences assigned to career offenders cannot be described as mere happenstance, then, but as the foreseeable result of the discretion Congress has assigned to (and left with) prosecutors." *Hernandez*, 79 F.3d at 600.[6] The Commission's view that the two groups should be consolidated to prevent the exercise of prosecutorial discretion is directly contrary to that congressional policy determination. It therefore cannot furnish a legitimate basis for Amendment 506.

2. Respondents contend, in the alternative, that even if courts should review Amendment 506 under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether it complies with Section 994(h), the amendment is valid because Section 994(h) is ambiguous and the Commission's understanding of Section 994(h) is "permissible." Resp. Br. 38. Respondents' argument fails at the outset, because they do not identify a reasonable basis for construing the phrase "maximum

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[6] We do not have statistical information concerning the percentage of defendants sentenced under the Career Offender Guideline who are subject to enhanced maximum terms because the government has filed a notice under 21 U.S.C. 851. Cf. Resp. Br. 14 n.6. The Department of Justice's policy with respect to the filing of such notices is that generally the prosecutor should seek an enhanced sentence if he can prove the prior convictions. See U.S. Attorney's Manual 9-27.310(B) ("Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. §851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea."). There are, of course, exceptions to that policy. The relevant paragraphs of that policy are set forth in an appendix to this brief.

term authorized" to refer to the unenhanced maximum term.

"The word 'maximum' naturally connotes the upper limit of a range, or the greatest quantity possible or permissible." *United States* v. *Hernandez*, 79 F.3d at 595. Each of the respondents in this case was subject, as a result of his prior convictions, to an enhanced statutory maximum term of imprisonment. With respect to each respondent, the government filed the notice required by 21 U.S.C. 851(a)(1) as a precondition to imposition of the enhanced penalties. Pet. App. 7a. It is thus beyond dispute that an enhanced term of imprisonment was "authorized" for each respondent. The unenhanced (*i.e.*, lower) maximum term applicable to a non-recidivist convicted of the same offense therefore cannot be the "maximum term authorized" for respondents themselves.[7]

In arguing that the phrase "maximum term authorized" is ambiguous, respondents rely (see Resp. Br. 39-42) on this Court's decision in *United States* v. *R.L.C.*, 503 U.S. 291 (1992). In *R.L.C.*, this Court construed 18 U.S.C. 5037(c), which provides that the term of detention ordered for a juvenile found to be a juvenile delinquent may not extend beyond "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." 503 U.S. at 306. The government contended that "the maximum term of imprisonment that would

[7] As we note in our opening brief (see Br. 5-6), the courts of appeals that had addressed the question before the Commission's promulgation of Amendment 506 had uniformly concluded that the "offense statutory maximum" for a defendant with prior convictions was the enhanced maximum penalty, not the maximum penalty authorized for a defendant with no prior convictions.

be authorized" for a similarly situated adult offender was the statutory maximum term. See *id.* at 297. This Court disagreed, holding that the applicable "maximum term" was the upper limit of the Guidelines range applicable to the adult offender. See *id.* at 306-307. In response to the government's contention that the word "authorized" referred to a statutory maximum term because only Congress can authorize imprisonment, the Court observed that "the mandate to apply the Guidelines is itself statutory." *Id.* at 297 (citing 18 U.S.C. 3553(b)). The Court thus viewed the government's construction as, at most, "one possible resolution of statutory ambiguity. *Id.* at 298. A plurality then rejected the government's approach, concluding that the "textual evolution" and "legislative history" eliminated the ambiguity, *id.* at 298-305 (opinion of Souter, J.), while three Justices relied on the rule of lenity, *id.* at 307-311 (opinion of Scalia, J.).

R.L.C. does indicate that in some contexts the phrase "maximum term authorized" may be ambiguous. Respondents are incorrect, however, in asserting that "[t]he decision in *R.L.C.* establishes that the meaning of 'maximum' is not self-evident or unambiguous." Resp. Br. 40. Nothing in *R.L.C.* casts doubt upon the self-evident proposition that, as between two "authorized" terms of imprisonment, the "maximum" is the higher of the two. Rather, the ambiguity in *R.L.C.* involved the word "authorized," not the word "maximum." See 503 U.S. at 298. The question, more precisely, was whether a term of imprisonment above the applicable Guidelines range—*i.e.*, a term that could be imposed only upon a finding of unusual circumstances sufficient to justify a departure under 18 U.S.C. 3553(b)—was a sentence "that would be

authorized if the juvenile had been tried and convicted as an adult."

As we explain in our opening brief (Br. 19 n.7), *R.L.C.* provides no support for respondents' position in the instant case. Because Section 994(h) is designed to constrain the Commission's discretion in the promulgation of Guidelines, the phrase "maximum term authorized" cannot plausibly be construed here to mean the upper limit of the Guidelines range. The Commission itself has recognized that "the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute." Guidelines § 4B1.1 (background). The legislative history is to the same effect. See S. Rep. No. 225, 98th Cong., 1st Sess. 120 (1983) ("proposed 28 U.S.C. 994(h) requires the sentencing guidelines to specify a term of imprisonment at or near the statutory maximum for a third conviction of a felony that involves a crime of violence or drug trafficking"). And, while Respondents at one point assert (Resp. Br. 45 n.28) that "it is not clear that Congress necessarily precluded the Sentencing Commission from interpreting that phrase to refer to the maximum of the applicable guideline range," in an unguarded moment respondents themselves characterize Section 994(h) as "requiring that the guidelines call for sentences for certain 'categories of' repeat offenders that are 'at or near' the 'authorized' statutory maximum." Resp. Br. 3.

At most, *R.L.C.* could be read to indicate that all statutory provisions that bear on establishing the applicable maximum term should be considered in determining what is the "maximum term authorized." For respondents and similarly situated defendants, the result of such an analysis is the enhanced

statutory maximum. Respondents had prior convictions; the government filed the notice under 21 U.S.C. 851 that is a prerequisite to imposing the recidivist enhancements; and no provision of law prohibited the sentencing court from imposing a term of imprisonment up to and including the enhanced statutory maximum. Since respondents are typical of the class that Section 994(h) addressed, the only reasonable construction of Section 994(h) is that it refers to the enhanced maximum terms.

Respondents assert (Resp. Br. 42-43) that *R.L.C.* supports the conclusion that the enhanced maximum terms are not the statutorily "authorized" maximum terms in cases where the government fails to file the notice required under Section 851. That is not obviously correct; *R.L.C.* involved two statutes bearing on the substantive length of the sentence, while this case involves only one such statute, *i.e.*, 21 U.S.C. 841(b). The maximum term "'[a]uthorized' in this context [Section 994(h)] is a prospective term that focuses on possibilities rather than outcomes." *Hernandez*, 79 F.3d at 597. But even if the phrase "maximum term authorized" is ambiguous in cases where no Section 851 notice is filed, it would not justify a conclusion that Section 994(h)'s reference to "maximum" terms may mean the unenhanced maximum in *all* cases. When the government does provide notice of its intent to rely on prior convictions in accordance with Section 851(a)(1), it is clear that a sentence up to and including the enhanced maximum is "authorized" by all of the pertinent statutes. And Congress drafted Section 994(h) with full awareness that federal law authorized enhanced sentences for repeat drug offenders. See Gov't Br. 23-24. Accordingly, there is no basis for concluding that the

unenhanced maximum term could plausibly constitute the Section 994(h) "maximum term authorized" in *every* case involving a career offender.

Respondents also seek to find ambiguity in Section 994(h) by noting that it requires the Commission to prescribe sentences for "categories" of offenders, Resp. Br. 44, that Congress used a variety of phrases in directing the Commission how to formulate the Guidelines, *id.* at 45 (noting use of terms "assure," "insure," and "ensure"), and that Section 994 "reads like the delicate political compromise it was," *ibid.* None of those observations detracts from the fact that Section 994(h)'s reference to "maximum term authorized" unambiguously connotes the uppermost limit—not, as the Commission has provided, a sub-maximum term.

3. Finally, respondents contend (Br. 47-48) that if this Court holds Amendment 506 to be invalid, it should remand for resentencing pursuant to 18 U.S.C. 3553(b). Section 3553(b) provides, *inter alia*, that "[i]n the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence." Respondents' argument is without merit. Invalidation of Amendment 506 would not leave the district court without "an applicable sentencing guideline." Guidelines § 4B1.1 reflects the Sentencing Commission's considered judgment regarding the appropriate methodology for calculating a Guidelines range "at or near" a given statutory maximum. None of the parties to this case has contested the propriety of that methodology, and the invalidation of Amendment 506 would not call it into question. If this Court holds that Amendment 506 is invalid as inconsistent with Section 994(h), sentencing courts may continue to apply Guidelines § 4B1.1 as written, while treating

the enhanced maximum penalty as the "offense statutory maximum" within the meaning of the Guideline.

* * * * *

For the reasons stated above, and in our opening brief, the judgment of the court of appeals should be reversed. The case should be remanded with instructions to affirm the judgments of the district court with respect to respondents Hunnewell and Dyer, and to reverse the judgment of the district court with respect to respondent LaBonte.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

NOVEMBER 1996

APPENDIX

U.S. Attorney's Manual 9-27.310(B) states, in pertinent part:

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. *See*, *e.g.*, 21 U.S.C. §§ 841 (b) (1)(A), (B), and (C), 848 (a), 960 (b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon. 21 U.S.C. § 851.

Every prosecutor should regard the filing of an information under 21 U.S.C. §851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. §851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which a sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney, or, within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing as required by paragraph 2B, above. Such a reason might include, for example, that

the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement; (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence; and (3) dismissing a previously filed enhancement.

ORIGINAL

No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE, ALFRED LAWRENCE HUNNEWELL, DAVID E. PIPER AND STEPHEN DYER, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF RESPONDENT STEPHEN DYER TO PROCEED IN FORMA PAUPERIS

Respondent herein Stephen Dyer, acting pro se, and pursuant to Rule 39 of the Rules of the Supreme Court, hereby requests leave to proceed in this case in forma pauperis for the following reasons:

1. Stephen Dyer is the Respondent herein and was the Appellant below in the First Circuit Court of Appeals in an appeal wherein the First Circuit Court granted the Respondent relief for the issue raised before this Honorable Court. The Circuit Court vacated his judgment of conviction in part and remanded it for resentencing.

8 pp

2. The Respondent has not previously been granted leave to proceed in forma pauperis in the U.S. District Court or the First Circuit Court of Appeals.

3. The Respondent and his family are not financially able to retain legal counsel for this appeal.

4. The Respondent's Declaration in support of this Motion is attached hereto.

WHEREFORE, Respondent Stephen Dyer respectfully requests leave to proceed in forma pauperis pursuant to Rule 39 of the United States Supreme Court and that the Court appoint counsel to appear for the Respondent in all court proceedings including the oral arguments.

Respectfully submitted,

Stephen Dyer
03117-036 (D-2)
2680 HWY 301 South
Jesup, GA 31599

Dated: June 10, 1996

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, STEPHEN DYER the Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No x
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer..

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes X No ___

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. $3,600 in rental income.

3. Do you own any cash or have a checking or savings account? Yes ___ No X

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes x No ___

   a. If the answer is yes, describe the property and state its approximate value.
   Condo (2 Bedroom) FMV $26,000. Morgages $22,500 in first & second mortgages.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: June 10, 1996.

(Signature)

Stephen Dyer
Reg. No. 03117-036
2680 HWY 301 SOUTH, D-2
JESUP, GA 31599

No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LABONTE, ALFRED LAWRENCE HUNNEWELL, DAVID E. PIPER AND STEPHEN DYER, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT STEPHEN DYER'S OPPOSITION BRIEF TO PETITION

STEPHEN DYER
Reg. No. 03117-036
2680 HWY 301 South, D-2
Jesup, GA 31599

QUESTION PRESENTED

Whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of" career offenders.

OPINION BELOW

The Respondent's opinion of the Court of Appeals for the First Circuit is reported at 70 F.3d 1396 and is contained in Petitioner's Appendix at 1a-53a.

JURISDICTION

Jurisdiction of this Honorable Court is allowed pursuant to U.S.C. §"1254(1).

STATUTORY PROVISION INVOLVED

Petitioner has correctly set forth the statutory provision and the U.S. Sentencing Guideline Commentary that is involved in this case.

STATEMENT OF THE CASE

Respondent Stephen Dyer respectfully opposes the Petition for Writ of Certiorari on the grounds stated in the other Respondent's briefs in Opposition to the Petitioner's Writ of Certiorari, and for those legal reasons cited in the First Circuit court of Appeals.

On page 17 of the Petitioner's Writ for Certiorari the Government states that "[t]he ultimate resolution of the issue will have a significant effect on the periods of incarceration for the country's most serious drug offenders." The Respondent Dyer is an example of the "overkill" sentences to be achieved by affirming the government's Writ of Certiorari. All of the Respondent's are not "serious drug offenders". At most petty thiefs and small time drug users and small street dealers characterize the Respondents.

Respondent Dyer would have served less than 24 months before applying the Career Offender enhancement. The three prior offenses are a perfect example of the misuse of this enhancement if brought to the extreme sentences that the Government is attempting to enforce. One of Mr. Dyer prior offenses involved a commercial "burglary". It was according to the facts of his case an "attempted shoplifting" of prescription drugs which he had ran out of. He went to the store during normal business hours, entered their opened front store and legally entered the store. When he saw that the pharmacy department was closed he "panicked". He saw the Tussionex grapped it from the shelf after forcing open an interior door to the pharmacy area. He picked it up. Realizing what he had done he put the bottle back on the counter. This crime caused him to go from a 24 month sentence to a 262 months. His other crime was selling one (1) of his own legally prescribed Glutethimide to an undercover agent in a sting operation pursuant to the pleas of his girlfriend. Rather than go through a long costly and protracted litigation many defendants like the Respondents plea

bargain to an offense which has dire consequences in the future. For the Respondent's petty crimes he will serve an additional 19 to 20 years. He like the other Respondents are not serious drug offenders. Like most criminal prosecutions the government's cases involve the petty offenders who suffer the unconscionable consequences of a sentencing guideline that at times is both unfair and possibly "cruel and inhuman punishment". The crimes of the Respondent in no stretch of the imagination warrant a 262 month sentence for his petty crimes. Even with the First Circuit ruling the Respondent Dyer's sentence would be over 210 months

REASONS FOR DENYING PETITION

The Respondent Dyer adopts all of the arguments presented before this Honorable Court by the other Respondents and the First Circuit Court of Appeals.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Stephen Dyer
Reg. No. 03117-036
2680 HWY 301 South, D-2
Jesup, GA 31599

Stephen Dyer
03117-036 (D-2)
2680 HWY 301 South
Josup, GA 31599

June 10, 1996

United States Supreme Court
Washington, DC 20543

Attention: E. Kathleen Tycz
Documents Control

Dear Ms. Tycz:

Enclosed herewith are three (3) copies of my In Forma Pauperis Motion and my Motion to Object to the Court grnating Certiorari. Your assistance in this matter is gratefully appreciated. Your due diligence will preserve my rights more then my prior three attorneys.

I have also followed your instructions and mailed these and faxed a copy to your attention

Sincerely,

Stephen Dyer

FAXED TO (202)479-3021 ATTENTION: E. KATHLEEN TYCZ, DOCUMENTS CONTROL

No. 95-1726

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES, PETITIONER

v.

GEORGE LABONTE,
ALFRED LAWRENCE HUNNEWELL, AND
STEPHEN DYER, RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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ATTORNEYS FOR AMICI CURIAE

QUESTION PRESENTED

Whether the Sentencing Commission permissibly implemented the statutory mandate to sentence certain "categories of" repeat offenders "at or near the maximum term authorized" in defining the term "Offense Statutory Maximum" as used in the Guidelines' Career Offender provision, § 4B1.1.

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INTEREST OF AMICI[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded over 25 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives is to ensure the proper administration of criminal justice and to promote fair and consistent application of sentencing laws. Thus, NACDL has a vital interest in ensuring that federal sentencing statutes are construed in a manner that will allow sentencing courts to impose appropriate and just sentences.

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and does advocacy work regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparities, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in

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[1] This *amicus curiae* brief is filed pursuant to Rule 37 of the Rules of the Supreme Court of the United States. The petitioner and respondents have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court.

1991, FAMM has 33,103 members nationwide with 36 chapters in 26 states and the District of Columbia. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for *pro bono* litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime.

SUMMARY OF ARGUMENT

The Sentencing Commission's amended definition of the term "Offense Statutory Maximum" in the Sentencing Guideline's Career Offender provision, U.S.S.G. § 4B1.1 (Nov. 1995),[2] represents a thoroughly reasonable interpretation of the legislative mandate to sentence certain "categories of defendants" "at or near the maximum term authorized."

Amendment 506 to the Sentencing Guidelines clarified that, for the purposes of the Career Offender provision, a career offender's "offense level" should be calculated based on the predicate offense's statutory maximum sentence unenhanced by any recidivist provisions in those predicate offense statutes. U.S.S.G. § 4B1.1, comment. (n.2). The Sentencing Commission explained that "[t]his rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced

[2] All citations to the U.S. Sentencing Guidelines are to the November 1995 edition unless otherwise noted.

penalties based on prior convictions." U.S.S.G. App. C, Amend. 506, at 805 (Nov. 1994). This explanation demonstrates that the Commission's actions were aimed at reducing unwarranted disparities and reining in unfettered prosecutorial discretion in sentencing, thereby conforming the guidelines to the central goals of the Sentencing Reform Act of 1984. The Commission stands by the propriety of its amendment.[3]

Contrary to the Government's position, the statutory language of 28 U.S.C. § 994(h) does not mandate, unambiguously, that career offenders have their "offense level" within the career offender guideline established based on an enhanced statutory maximum, in those cases in which a prosecutor chooses to charge a defendant with those enhancements. Rather, this statutory language is susceptible to several plausible interpretations and the Commission

[3] The Commission expressed its continued support of Amendment 506 in a letter to FAMM President, Julie Stewart, in which the Commission's General Counsel wrote:

> The Sentencing Commission continues to have a keen interest in [the validity of Amendment 506 to the sentencing guidelines]. . . . [W]e have every confidence that the important issues in these cases will be well developed and effectively presented to the Court. Moreover, there appears to be no significant divergence of interests between the individual defendants and the Commission in regard to the validity of this particular amendment. Thus, the Commission has not felt it necessary to pursue formal intervention in this litigation.

(Letter from John R. Steer, General Counsel, United States Sentencing Comm'n (Sept. 20, 1996); attached hereto as Appendix A.) Ironically, in this case, the Solicitor General's office has opted to take a position against the interests of the Commission, an entity that, under other circumstances, the Solicitor General would represent. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989).

appropriately exercised its authority in choosing among these competing interpretations.

The Commission's interpretation of § 994 requires that all those convicted of a qualifying offense who possess a qualifying criminal history, have their career offender "offense level" based on the maximum sentence that applies to all such defendants, that is, the unenhanced statutory maximum. This interpretation removes the "unwarranted disparities" that would otherwise arise from a prosecutorial decision to seek an enhancement in some cases, but not in others, where the defendants have identical criminal histories. Moreover, Congress intended comparable treatment for those "categories of defendants" charged with *either* a violent felony *or* a serious drug offense, who had previously been convicted of two or more qualifying felonies. Under the Government's interpretation, contrary to that congressional directive, a sub-set of these defendants could be sentenced based on an enhanced statutory maximum.

Further, the language and legislative history of the Sentencing Reform Act of 1984 support the Commission's interpretation of its statutory mandate in this case. The congressional decision to reform federal sentencing procedures reflected a great dissatisfaction with sentencing disparities among similarly situated defendants. Congress observed, "[t]his disparity is fair neither to the offenders nor to the public." S. Rep. No. 225, 98th Cong., 2d Sess. 49 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3232. The guidelines reflect the Sentencing Commission's effort to "solve both the practical and

philosophical problems of developing a coherent sentencing system[,]" to achieve "a more honest, uniform, equitable, proportional, and therefore effective sentencing system." U.S.S.G. Ch. 1, Pt.A, intro. comment. at 3, 4. The Career Offender provision fits within this comprehensive scheme, and works to respond fairly to the array of factors involved in the sentencing decision.

Finally, the Amendment reduces unfairness. The Commission's mode of calculating a career offender's offense level prevents unfair double counting, while the Government's position would have the criminal histories of some defendants counted against them twice, once *via* the statutory enhancement, and a second time by means of the enhancement inherent in § 4B1.1. In addition, the Commission's approach reduces the exercise of *ad hoc* prosecutorial discretion to insure that defendants with similar criminal histories, convicted of similar offenses will be treated similarly. Fairness and uniform treatment were to be the hallmark of sentencing reform and the Commission's efforts towards these ends should not be stymied.

Part I, below, highlights the language and legislative history of the Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 & 28 U.S.C.), as well as the evolution of the Career Offender provision, all of which support and contextualize the Commission's interpretation of its statutory mandate.

Part II, below, examines the language of 28 U.S.C. § 994(h), demonstrates that that language is ambiguous, and

illustrates that Amendment 506 represents a permissible, indeed a sensible and coherent, construction of that language.

ARGUMENT

I. The Language and Legislative History of the Sentencing Reform Act, and the Evolution of Amendment 506, Support the Commission's Approach to Setting the Offense Levels for Career Offenders.

A. The Sentencing Reform Act's Language and Legislative History Reveal that Congress Delegated Substantial Authority to the Sentencing Commission to Develop a Comprehensive Approach to the Treatment of Repeat Offenders.

The Sentencing Reform Act of 1984 effected a sea of change in federal sentencing, replacing a system wrought with disparities with one seeking fair and uniform treatment of those convicted of federal crimes. As explained in the legislative history of the Act:

> The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently. This approach will *eliminate specialized sentencing statutes that cover narrow classes of offenders*[.] . . . The sentencing guidelines will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender.

S. Rep. No. 225, 98th Cong., 2d Sess. 51 (1983) (footnote omitted, emphasis added), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3234.

Mindful of the complexity of the task it set out, Congress created the Sentencing Commission to "establish sentencing policies and practices" that satisfy the articulated purposes of sentencing,[4] and "provide certainty and fairness[,] . . . avoiding unwarranted sentencing disparities[.]" 28 U.S.C. § 991(b). The legislative history reflects the substantial public trust placed in the Commission when it takes note of "the extraordinary powers and responsibilities vested in the Commission, as well as the enormous potential for unparalleled improvement in the fairness and effectiveness of Federal criminal justice as a whole[.]" S. Rep. No. 225, 98th Cong., 2d Sess. 160 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3343.

To guide the Commission, Congress promulgated a set of directives outlining the "Duties of the Commission." 28 U.S.C. § 994. These directives instructed the Commission to formulate guidelines that would structure sentencing calculations to consider categories of offenses, including aggravating and mitigating factors, as well as categories of offenders, again including appropriate

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[4] Congress directed that sentences imposed should be "sufficient, *but not greater than necessary*" to "reflect the seriousness of the offense," deter criminal conduct, protect the public and provide defendants with "needed educational or vocational training, medical care, or other correctional treatment[.]" 18 U.S.C. § 3553(a) (emphasis added).

aggravating and mitigating factors. 28 U.S.C. § 994(c),(d). The guidelines were to provide "certainty and fairness," § 994(f), and take care to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," § 994(g).[5]

Congress instructed the Commission to use existing sentencing patterns "as a starting point in its development of the initial sets of guidelines for particular categories of cases," § 994(m), but stated unequivocally, that the Commission "shall not be bound by such . . . sentences, and shall *independently develop a sentencing range* that is consistent with the [articulated] purposes of sentencing[,]" *id.* (emphasis added). These instructions demonstrate Congress's expectation that the Commission would depart from past sentencing practices in order to effectuate a more comprehensive and consistent approach to sentencing.

Congress articulated its expectation that recidivist offenders would be subjected to augmented penalties. Among the pertinent directives is § 994(h), which provides:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and --
> (1) has been convicted of a felony that is --
> (A) a crime of violence; or
> (B) an offense described in [specified controlled substances statutes]; and
> (2) has previously been convicted of two or more prior felonies, each of which is --
> (A) A crime of violence; or
> (B) an offense described in [specified controlled substances statutes].

28 U.S.C. § 994(h). This language forms the basis of the Government's challenge to Amendment 506.

Congress intended that the directive contained in § 994(h) be addressed within the overall context of the sentencing guidelines. As the legislative history explains:

> Subsection (h) was added to the bill . . . to replace a provision . . . that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; *the guidelines development process can assure consistent and rational implementation of the Committee's view* that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1983) (emphasis added), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3358. Here again, Congress opted for a scheme that would approach situations involving repeat offenders in a

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[5] The *amici* do not take the position, proposed by respondents, that the mandates contained in § 994 are, essentially, nonjusticiable. Rather, the *amici* take the more limited view that Amendment 506 constitutes a permissible exercise of the Commission's authority when analyzed pursuant to the test set forth in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

uniform manner and within the context of the overall sentencing scheme as developed by the Sentencing Commission.

Congress included other directives targeting recidivism, instructing that an individual's criminal history should be considered in the sentencing calculation, § 994(d)(10), and indicating that certain categories of defendants receive "a substantial term of imprisonment[,]" § 994(i). Significantly, Congress indicated that these "substantial terms of imprisonment" should be secured through a guidelines calculation scheme, not via *ad hoc* statutory enhancements. The legislative history explains:

> [R]ather than providing enhanced sentences above the maximum sentence provided for any other similar offense, as is done in current 18 U.S.C. 3575(b),[6] section 994(i) requires that the guidelines insure a substantial sentence to imprisonment that is nevertheless *within the range generally available* for the offense.

S. Rep. No. 225, 98th Cong., 2d Sess. 176 (1983) (emphasis added) , *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3359. This legislative history supports the conclusion that Congress intended that the guidelines would tackle sentencing in a comprehensive manner.

The Sentencing Commission created the "Career

[6] Section 3575 of Title 18, repealed by the Sentencing Reform Act, provided for increased sentences for "dangerous special offenders."

Offender" guideline, § 4B1.1, as a part of the overall sentencing scheme. Tracking the statutory directive contained in § 994(h), this guideline defines the category of defendants to which it applies as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. The guideline then specifies how these offenders should have their "offense level" calculated:

> If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Id. The guideline table sets the offense level based on the "offense statutory maximum." *Id.* The original guideline defined "Offense Statutory Maximum" as "the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense." U.S.S.G. § 4B1.1, comment. (n.2) (Nov. 1987).

After the Guidelines took effect, some courts applying the career offender provision calculated the "offense statutory maximum" by looking to enhanced statutory maximums based on an individual defendant's

criminal history and the prosecutor's charging decision. *See, e.g., United States v. Smith*, 984 F.2d 1084, 1085 (10th Cir.), *cert. denied*, 510 U.S. 873 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C. Cir. 1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir. 1991). These decisions prompted the Commission to amend its commentary to clarify the guidelines' term "offense statutory maximum."

B. The Commission's Amendment of the Career Offender Guideline Reduces Unwarranted Sentencing Disparities.

The Commission, with congressional approval, revised the commentary to § 4B1.1 *via* Amendment 506 in 1994. Amendment 506 arises naturally from the Commission's authority and duty to periodically "review and revise" the Guidelines. 28 U.S.C. §994(o); *see also Braxton v. United States*, 500 U.S. 344, 348 (1991). As this Court has explained: "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton*, 500 U.S. at 348. Amending the Guidelines is an unexceptional, indeed required, part of the Commission's ongoing function.[7]

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[7] It should be noted that the Attorney General, or her designee, is an *ex officio*, nonvoting member of the Commission. 28 U.S.C. § 991. Therefore, the Department of Justice has a front row seat during guidelines policy development, including amendments, and has more opportunity than others to express its concerns about potential amendments, and if not satisfied with the results at the Commission, to bring its concerns to the attention of Congress.

Amendment 506 clarifies that, for the purposes of § 4B1.1, courts should base the offense level on *unenhanced* statutory maximums. U.S.S.G. § 4B1.1, comment (n.2). The Commission explained that this amendment "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." U.S.S.G. App. C, Amend. 506, at 805 (Nov. 1994), *also published at* Amendment Notice, 59 Fed. Reg. 23,608, 23,609 (1994).

The Commission submitted Amendment 506 to Congress, along with a number of other proposed amendments, on April 28, 1994, and notice of these proposed amendments was published in the Federal Register on May 5, 1994. *See* Amendment Notice, 59 Fed. Reg. 23,608-23,610 (1994).[8] Congress took no action to modify or disapprove the amendment, and it became effective November 1, 1994. *See generally* 28 U.S.C. § 994(p).[9]

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[8] The Commission indicated that original notice of the amendments "was published in the Federal Register of December 21, 1993 (58 F.R. 67,521) [and a] public hearing on the proposed amendments was held in Washington, D.C., on March 24, 1994." Amendment Notice, 59 Fed. Reg. 23,608 (1994).

[9] The "report and wait" procedure that Amendment 506 went through pursuant to § 994(p) provides meaningful Congressional review. For example, Congress has declined to adopt other proposed amendments. *See, e.g.*, Pub. L. No. 104-38, 109 Stat. 334 (rejecting an amendment that would have changed the base offense levels applicable to money laundering offenses and rejecting an amendment that would have equalized the treatment of crack cocaine and powder cocaine).

In 1995, the Commission again fine tuned § 4B1.1. Amendment 528 was added to the "Background" section of § 4B1.1 to clarify that the Career Offender provisions of the Guidelines are based on 28 U.S.C. § 994(a)-(f), and its authority pursuant to § 994(o) and (p), as well as § 994(h). U.S.S.G. App. C, Amend. 528, at 830. *See also United States v. Damerville*, 27 F.3d 254, 256-57 (7th Cir.) (noting that § 4B1.1 stems from the Commission's authority under § 994(a) in addition to its authority under §994(h)), *cert. denied*, 115 S. Ct. 55 (1994); *United States v. Heim*, 15 F.3d 830, 832 (9th Cir.) (same), *cert. denied*, 115 S. Ct. 55 (1994); *United States v. Hightower*, 25 F.3d 183, 186 (3d Cir.) (same), *cert. denied*, 115 S. Ct 370 (1994). By clarifying that § 4B1.1 rests on the Commission's general authority under § 994(a), the Commission underlines its mandate to integrate the demands imposed by § 994(h) with the other guidelines goals and responsibilities.

In addition, Amendment 528 added the following language to the "Background" section of § 4B1.1:

> [T]he Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ." 28 U.S.C. § 991(b)(1)(B).

U.S.S.G. § 4B1.1, comment. (backg'd.) (ellipses in original). The Commission also indicated its position that its amendments to this section were in line with congressional

intent, noting:

> The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Id. (bracketed information in original). This amendment elucidates the Commission's position with respect to its authority to structure the Career Offender provision as it has, and its understanding that its actions comport with the legislative mandate and legislative intent.

II. Amendment 506 Does Not Violate Any Federal Statute and Constitutes a Legitimate Exercise of the Sentencing Commission's Authority and Expertise.

Amendment 506 does not violate 28 U.S.C. § 994(h), or any other federal statute, and the amended commentary should be accorded controlling weight. *Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913, 1919 (1993). The two-part analysis from *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), supports this conclusion.

The Government can only impose its view of how to calculate the sentences of "career offenders" by pointing to an unambiguous expression of congressional intent that mirrors its view. *Chevron*, 467 U.S. at 842. This it cannot do. In fact, the Commission's "alternative" interpretation of the statutory mandate reflects a reasoned approach that integrates the directive contained in § 994(h) with the Sentencing Reform Act's other mandates. In short, the Commission accomplished exactly what Congress hoped it would,"a consistent and rational implementation of the [legislature's] view that [certain repeat offenders receive] substantial prison terms." S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3358.

A. Amendment 506 Does Not Violate Unambiguously Expressed Congressional Intent.

The language of § 994(h) does not answer "the precise question[s] at issue[,]" *Chevron*, 467 U.S. at 842, that is, whether the call to sentence certain "categories of defendants" "at or near the maximum term authorized" requires the guidelines to be written in such a way as to assure that, if the prosecutor chooses to charge a given defendant with statutory enhancements, those statutory enhancements will serve as the basis for that defendant's "offense level" within the "career offender" guideline. The Government's position that this is, unambiguously, the only interpretation of § 994(h) does not withstand scrutiny.

The Commission's approach to calculating the offense level of "career offenders" constitutes a thoroughly reasonable means of implementing the directive to sentence certain "categories of defendants" "at or near the maximum term authorized." The existence of this compelling "alternative" interpretation of the statutory mandate indicates that the intent of Congress is not clear.

As the First Circuit noted, the "categories of defendants" at issue could be comprised of "those defendants charged with violations of similar statutes against whom prosecutors have filed notices of intention to seek sentence enhancements[,] *United States v. LaBonte*, 70 F.3d 1396, 1404-05 (1st Cir. 1995), *cert. granted*, 116 S. Ct. 2545 (1996), or "[t]he word 'categories' plausibly can be defined more broadly to include all offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant[,]" 70 F.3d at 1405. A third interpretation would be that Congress intended comparable treatment for those "categories of defendants" charged with *either* a violent felony *or* a serious drug offense, who had previously been charged with two or more qualifying felonies.[10]

Nor is it self-evident, as the Government urges (Pet.

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[10] This interpretation, which directly tracks the statutory language, also serves the end of reducing unwarranted sentencing disparities among those defendants with comparable records found guilty of similar, or comparable, criminal conduct, as required by 28 U.S.C. § 991(b)(1)(B). *See* discussion *infra* part II.B.

Br. at 18), that the phrase, "at or near the maximum term authorized," *requires* the Guidelines to identify a career offender's "offense level" based on the "enhanced" statutory maximum. A similar argument was considered and rejected in *United States v. R.L.C.*, 503 U.S. 291 (1992). In that case, the Government asserted that the term "authorized" was unambiguous and "refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines[.]" *R.L.C.*, 503 U.S. at 297. The Court disagreed, stating that the Government's position "beg[s] the question," explaining: "The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory." 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)).

As in *R.L.C.*, this case involves two potentially conflicting mandates, one derived from a statute, and one based in the Guidelines. In *R.L.C.*, the Court framed the issue before it aptly: "The question . . . is whether Congress intended the courts to treat the upper limit of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult case would bar imposition up to the limit[.]" 503 U.S. at 297. In ruling against the Government in *R.L.C.*, the Court concluded:

> Here, it suffices to say that the Government's construction is by no means plain. The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power.

503 U.S. at 298. Similarly, in this case, the "plain meaning" of the statutory directive to assign sentences at or near the "maximum term authorized" does not patently require that a career offender's "offense level" be based on an enhanced statutory maximum. Although the Government might like this to be the case, it is far from obvious that Congress intended this interpretation.

In sum, it cannot be said that the congressional mandate contained in § 994(h) "unambiguously expressed [the] intent of Congress." *Chevron*, 467 U.S. at 843.

B. Amendment 506 Embodies a Thoroughly Reasonable and Coherent Construction of the Statutory Directive Regarding Certain Recidivist Defendants.

Amendment 506 reflects a sensible and uniform approach to the sentencing of those designated as career offenders. Further, so long as this amendment is based on a "permissible construction of the statute[,]" it must be upheld. *Chevron*, 467 U.S. at 843.

Not only is the Commission's interpretation permissible, it provides the only means of assuring compliance with the statutory mandate to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 28 U.S.C. § 991(b)(1) (B). Because of the many

options available to prosecutors -- bringing, enhancing or reducing charges -- they are able to introduce unwarranted disparity into sentencing outcomes. Thus, the exercise of prosecutorial discretion frequently results in offenders with like records and similar culpability receiving different sentences, the anathema of sentencing reform.

One need look no further than the Sentencing Reform Act itself to see that Congress was concerned that prosecutorial discretion would perpetuate unjustified disparities in the treatment of similarly situated persons. Congress expressly expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. 98-225, 98th Cong. 1st Sess. 63, 167 (1983). The Sentencing Commission, in response to the congressional directive in 28 U.S.C. § 994(a)(2)(E), advises judges not to accept charge bargains unless it is determined, "for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." U.S.S.G. § 6B1.2(a).

The Government's reading of § 994(h) amplifies the virtually unreviewable prosecutorial discretion to determine sentences and undermine the Sentencing Guidelines. Professor Schulhofer and former Commissioner Nagel warn that "it is ... important to recognize the sentencing discretion which remains in the prosecutorial hands. If abused and unchecked, this discretion has the potential to create the disparities that sentencing reform was intended to prevent." Stephen Schulhofer & Ilene Nagel, *Negotiated Pleas Under*

the Federal Sentencing Guidelines: The First Fifteen Months, 27 Am. Crim. L. Rev. 231, 232 (1989). If the Guidelines did not base a career offender's "offense level" on the unenhanced statutory maximum, then two defendants, both convicted of a drug offense and having two prior qualifying felonies, at least one being a drug offense, could be treated entirely disparately based upon the prosecutor's whim. This differential treatment flies in the face of the congressional directive to avoid unwarranted sentencing disparities.

Amendment 506 eliminates other unwarranted disparities beyond those associated with prosecutorial discretion. For example, under the Government's interpretation of § 994(h), a defendant who was convicted for a third qualifying drug offense could receive an "offense level" based on an enhanced statutory maximum, while a defendant who was convicted of the same drug offense, who had previously been convicted of two violent felonies, would receive an "offense level" based on an unenhanced statutory maximum.

Th[illegible]erential treatment conflicts with the language of § 994(h) which mandates certain treatment for "categories of defendants in which the defendant" meets certain criteria. This section does not simply direct treatment for "defendants who" meet these criteria. This choice of language suggests that Congress expects these "categories of defendants" to receive comparable treatment under the Guidelines. That is, Congress directed that the Guidelines mete out equal treatment to those "categories of defendants" who are convicted of a crime of violence, and have two prior

convictions for controlled substances offenses, and those "categories of defendants" who are convicted of a third controlled substances offense. Interpreted in this manner, the Commission has done exactly what Congress intended.

Contrary to the Government's position, the Guidelines, in this case, fully satisfy the congressional objectives of substantial penalties for repeat offenders and consistency in treatment of those offenders who commit comparable crimes and who have comparable criminal histories.

Aside from the "reasonableness" of Amendment 506, that amendment protects defendants from unfair double counting. If the Government's position were adopted, a defendant subject to the Career Offender provision would have his criminal history counted against him twice -- first *via* a statutory enhancement and then by the automatic "enhancements" triggered by the career offender guideline. Such treatment is overly harsh, particularly considering that the Career Offender provision standing alone is strong medicine.[11] Requiring double counting may well violate the congressional mandate to insure that sentences imposed are "sufficient, but not greater than necessary," 18 U.S.C. §3553(a), to achieve the stated purposes of sentencing. Further, the Commission's interpretation of the Guidelines

[11] For example, a non-career offender with a criminal history Category III, who is held responsible for the distribution of 35 grams of cocaine base (offense level 30), has a guideline range of 121-151 months. By comparison, the guideline range applicable to a similarly-situated defendant who is designated a career offender is 262-327 months. *See* U.S.S.G. § 4B1.1.

allows for imposition of significant penalties based on career offender status while also providing a more individualized means of tailoring a sentence to the offense committed and the defendant's role in that offense.[12]

Finally, as noted above, § 4B1.1 was formulated to address a range of congressional objectives, beyond the dictates of § 994(h). *See* U.S.S.G. § 4B1.1, comment. (backg'd.). Consequently, the competing aims of eliminating unwarranted disparities, cabining prosecutorial discretion, not exceeding the capacity of the federal prisons, and achieving greater fairness and certainty, all must enter the Commission's calculus in formulating the Guidelines, including the Career Offender provision.

Where, as here, the Commission received congressional approval for Amendment 506, and where the amended commentary represents a rational implementation of the legislative mandate, and does not violate the Constitution or any federal statute, nor conflict with the guideline it interprets, that commentary governs. *Stinson*, 113 S. Ct. at 1919.

[12] The guidelines provide for individualized assessments of liability for offense characteristics, adjustments related to the victim, defendant's role, and any obstruction of justice, acceptance of responsibility and substantial assistance to the Government. Further, in cases in which a sentencing judge determines that the guidelines calculation does not adequately represent the relevant aggravating and mitigating circumstances, he or she may depart from the guidelines. 18 U.S.C. § 3553(b).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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September 20, 1996

VIA FAX

Ms. Julie Stewart
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Dear Ms. Stewart:

Thank you for your letter of September 9, 1996 to Chairman Conaboy concerning the Sentencing Commission's possible intervention in United States v. LaBonte, a case currently before the United State Supreme Court in which the Government contests the validity of Amendment 506 to the sentencing guidelines. Chairman Conaboy asked me to respond to your letter.

The Sentencing Commission continues to have a keen interest in this matter. It has received several briefings from its Counsel at various stages of the litigation, including, most recently, an update at its September 19 meeting. At the early stages of this litigation, the Commission authorized its Counsel to informally advise and consult with attorneys advocating the validity of the amendment. Pursuant to this direction, our legal staff has had a number of substantive

discussions with counsel representing defendants impacted by Amendment 506, including counsel involved in the cases in which *certiorari* has been granted.

Based on these discussions, we have every confidence that the important issues in these cases will be well developed and effectively presented to the Court. Moreover, there appears to be no significant divergence of interests between the individual defendants and the Commission in regard to the validity of this particular amendment. Thus, the Commission has not felt it necessary to pursue formal intervention in this litigation.*

Thank you for your interest in this important issue.

Sincerely,

/s/

John R. Steer
General Counsel

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*The Sentencing Commission has always acknowledged the authority of the Attorney General under 28 U.S.C.§ 516, et. seq, in respect to litigation in which the United States is a party. With the permission of the parties and the Court, the Commission participated as an *amicus* in Mistretta v. United States, 488 U.S. 361 (1989), when the constitutionality of the Commission and the guideline system was at stake. Subsequently, the Commission has filed *amicus* briefs, with the permission of the Attorney General or through the Department of Justice, in a very limited number of cases involving the guidelines. The fact that the Commission's interests appear to be ably advanced by counsel for the defendants in these particular cases obviates any need to address procedural issues relating to possible Commission participation in this litigation.

QUESTION PRESENTED

Whether the Sentencing Commission permissibly implemented the statutory mandate to sentence certain "categories of" repeat offenders "at or near the maximum term authorized" in defining the term "Offense Statutory Maximum" as used in the Guidelines' Career Offender provision, § 4B1.1.

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INTEREST OF AMICI[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded over 25 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives is to ensure the proper administration of criminal justice and to promote fair and consistent application of sentencing laws. Thus, NACDL has a vital interest in ensuring that federal sentencing statutes are construed in a manner that will allow sentencing courts to impose appropriate and just sentences.

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and does advocacy work regarding the cost of mandatory minimum sentencing in terms of public expenditures, perpetuation of unwarranted and unjust sentencing disparities, and the transfer of the sentencing function from the judiciary to the prosecution. Founded in

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[1] This *amicus curiae* brief is filed pursuant to Rule 37 of the Rules of the Supreme Court of the United States. The petitioner and respondents have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court.

1991, FAMM has 33,103 members nationwide with 36 chapters in 26 states and the District of Columbia. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for *pro bono* litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime.

SUMMARY OF ARGUMENT

The Sentencing Commission's amended definition of the term "Offense Statutory Maximum" in the Sentencing Guideline's Career Offender provision, U.S.S.G. § 4B1.1 (Nov. 1995),[2] represents a thoroughly reasonable interpretation of the legislative mandate to sentence certain "categories of defendants" "at or near the maximum term authorized."

Amendment 506 to the Sentencing Guidelines clarified that, for the purposes of the Career Offender provision, a career offender's "offense level" should be calculated based on the predicate offense's statutory maximum sentence unenhanced by any recidivist provisions in those predicate offense statutes. U.S.S.G. § 4B1.1, comment. (n.2). The Sentencing Commission explained that "[t]his rule avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced

[2] All citations to the U.S. Sentencing Guidelines are to the November 1995 edition unless otherwise noted.

penalties based on prior convictions." U.S.S.G. App. C, Amend. 506, at 805 (Nov. 1994). This explanation demonstrates that the Commission's actions were aimed at reducing unwarranted disparities and reining in unfettered prosecutorial discretion in sentencing, thereby conforming the guidelines to the central goals of the Sentencing Reform Act of 1984. The Commission stands by the propriety of its amendment.[3]

Contrary to the Government's position, the statutory language of 28 U.S.C. § 994(h) does not mandate, unambiguously, that career offenders have their "offense level" within the career offender guideline established based on an enhanced statutory maximum, in those cases in which a prosecutor chooses to charge a defendant with those enhancements. Rather, this statutory language is susceptible to several plausible interpretations and the Commission

[3] The Commission expressed its continued support of Amendment 506 in a letter to FAMM President, Julie Stewart, in which the Commission's General Counsel wrote:

> The Sentencing Commission continues to have a keen interest in [the validity of Amendment 506 to the sentencing guidelines]. . . . [W]e have every confidence that the important issues in these cases will be well developed and effectively presented to the Court. Moreover, there appears to be no significant divergence of interests between the individual defendants and the Commission in regard to the validity of this particular amendment. Thus, the Commission has not felt it necessary to pursue formal intervention in this litigation.

(Letter from John R. Steer, General Counsel, United States Sentencing Comm'n (Sept. 20, 1996); attached hereto as Appendix A.) Ironically, in this case, the Solicitor General's office has opted to take a position against the interests of the Commission, an entity that, under other circumstances, the Solicitor General would represent. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989).

appropriately exercised its authority in choosing among these competing interpretations.

The Commission's interpretation of § 994 requires that all those convicted of a qualifying offense who possess a qualifying criminal history, have their career offender "offense level" based on the maximum sentence that applies to all such defendants, that is, the unenhanced statutory maximum. This interpretation removes the "unwarranted disparities" that would otherwise arise from a prosecutorial decision to seek an enhancement in some cases, but not in others, where the defendants have identical criminal histories. Moreover, Congress intended comparable treatment for those "categories of defendants" charged with *either* a violent felony *or* a serious drug offense, who had previously been convicted of two or more qualifying felonies. Under the Government's interpretation, contrary to that congressional directive, a sub-set of these defendants could be sentenced based on an enhanced statutory maximum.

Further, the language and legislative history of the Sentencing Reform Act of 1984 support the Commission's interpretation of its statutory mandate in this case. The congressional decision to reform federal sentencing procedures reflected a great dissatisfaction with sentencing disparities among similarly situated defendants. Congress observed, "[t]his disparity is fair neither to the offenders nor to the public." S. Rep. No. 225, 98th Cong., 2d Sess. 49 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3232. The guidelines reflect the Sentencing Commission's effort to "solve both the practical and

philosophical problems of developing a coherent sentencing system[,]" to achieve "a more honest, uniform, equitable, proportional, and therefore effective sentencing system." U.S.S.G. Ch. 1, Pt.A, intro. comment. at 3, 4. The Career Offender provision fits within this comprehensive scheme, and works to respond fairly to the array of factors involved in the sentencing decision.

Finally, the Amendment reduces unfairness. The Commission's mode of calculating a career offender's offense level prevents unfair double counting, while the Government's position would have the criminal histories of some defendants counted against them twice, once *via* the statutory enhancement, and a second time by means of the enhancement inherent in § 4B1.1. In addition, the Commission's approach reduces the exercise of *ad hoc* prosecutorial discretion to insure that defendants with similar criminal histories, convicted of similar offenses will be treated similarly. Fairness and uniform treatment were to be the hallmark of sentencing reform and the Commission's efforts towards these ends should not be stymied.

Part I, below, highlights the language and legislative history of the Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 & 28 U.S.C.), as well as the evolution of the Career Offender provision, all of which support and contextualize the Commission's interpretation of its statutory mandate.

Part II, below, examines the language of 28 U.S.C. § 994(h), demonstrates that that language is ambiguous, and

illustrates that Amendment 506 represents a permissible, indeed a sensible and coherent, construction of that language.

ARGUMENT

I. The Language and Legislative History of the Sentencing Reform Act, and the Evolution of Amendment 506, Support the Commission's Approach to Setting the Offense Levels for Career Offenders.

A. The Sentencing Reform Act's Language and Legislative History Reveal that Congress Delegated Substantial Authority to the Sentencing Commission to Develop a Comprehensive Approach to the Treatment of Repeat Offenders.

The Sentencing Reform Act of 1984 effected a sea of change in federal sentencing, replacing a system wrought with disparities with one seeking fair and uniform treatment of those convicted of federal crimes. As explained in the legislative history of the Act:

> The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently. This approach will *eliminate specialized sentencing statutes that cover narrow classes of offenders*[.] . . . The sentencing guidelines will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender.

S. Rep. No. 225, 98th Cong., 2d Sess. 51 (1983) (footnote omitted, emphasis added), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3234.

Mindful of the complexity of the task it set out, Congress created the Sentencing Commission to "establish sentencing policies and practices" that satisfy the articulated purposes of sentencing,[4] and "provide certainty and fairness[,] . . . avoiding unwarranted sentencing disparities[.]" 28 U.S.C. § 991(b). The legislative history reflects the substantial public trust placed in the Commission when it takes note of "the extraordinary powers and responsibilities vested in the Commission, as well as the enormous potential for unparalleled improvement in the fairness and effectiveness of Federal criminal justice as a whole[.]" S. Rep. No. 225, 98th Cong., 2d Sess. 160 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3343.

To guide the Commission, Congress promulgated a set of directives outlining the "Duties of the Commission." 28 U.S.C. § 994. These directives instructed the Commission to formulate guidelines that would structure sentencing calculations to consider categories of offenses, including aggravating and mitigating factors, as well as categories of offenders, again including appropriate

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[4] Congress directed that sentences imposed should be "sufficient, *but not greater than necessary*" to "reflect the seriousness of the offense," deter criminal conduct, protect the public and provide defendants with "needed educational or vocational training, medical care, or other correctional treatment[.]" 18 U.S.C. § 3553(a) (emphasis added).

aggravating and mitigating factors. 28 U.S.C. § 994(c),(d). The guidelines were to provide "certainty and fairness," § 994(f), and take care to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," § 994(g).[5]

Congress instructed the Commission to use existing sentencing patterns "as a starting point in its development of the initial sets of guidelines for particular categories of cases," § 994(m), but stated unequivocally, that the Commission "shall not be bound by such . . . sentences, and shall *independently develop a sentencing range* that is consistent with the [articulated] purposes of sentencing[,]" *id.* (emphasis added). These instructions demonstrate Congress's expectation that the Commission would depart from past sentencing practices in order to effectuate a more comprehensive and consistent approach to sentencing.

Congress articulated its expectation that recidivist offenders would be subjected to augmented penalties. Among the pertinent directives is § 994(h), which provides:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and --
> (1) has been convicted of a felony that is --
> (A) a crime of violence; or
> (B) an offense described in [specified controlled substances statutes]; and
> (2) has previously been convicted of two or more prior felonies, each of which is --
> (A) A crime of violence; or
> (B) an offense described in [specified controlled substances statutes].

28 U.S.C. § 994(h). This language forms the basis of the Government's challenge to Amendment 506.

Congress intended that the directive contained in § 994(h) be addressed within the overall context of the sentencing guidelines. As the legislative history explains:

> Subsection (h) was added to the bill . . . to replace a provision . . . that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders. The Committee believes that such a directive to the Sentencing Commission will be more effective; *the guidelines development process can assure consistent and rational implementation of the Committee's view* that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.

S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1983) (emphasis added), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3358. Here again, Congress opted for a scheme that would approach situations involving repeat offenders in a

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[5] The *amici* do not take the position, proposed by respondents, that the mandates contained in § 994 are, essentially, nonjusticiable. Rather, the *amici* take the more limited view that Amendment 506 constitutes a permissible exercise of the Commission's authority when analyzed pursuant to the test set forth in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

uniform manner and within the context of the overall sentencing scheme as developed by the Sentencing Commission.

Congress included other directives targeting recidivism, instructing that an individual's criminal history should be considered in the sentencing calculation, § 994(d)(10), and indicating that certain categories of defendants receive "a substantial term of imprisonment[,]" § 994(i). Significantly, Congress indicated that these "substantial terms of imprisonment" should be secured through a guidelines calculation scheme, not via *ad hoc* statutory enhancements. The legislative history explains:

> [R]ather than providing enhanced sentences above the maximum sentence provided for any other similar offense, as is done in current 18 U.S.C. 3575(b),[6] section 994(i) requires that the guidelines insure a substantial sentence to imprisonment that is nevertheless *within the range generally available* for the offense.

S. Rep. No. 225, 98th Cong., 2d Sess. 176 (1983) (emphasis added) , *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3359. This legislative history supports the conclusion that Congress intended that the guidelines would tackle sentencing in a comprehensive manner.

The Sentencing Commission created the "Career

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[6] Section 3575 of Title 18, repealed by the Sentencing Reform Act, provided for increased sentences for "dangerous special offenders."

Offender" guideline, § 4B1.1, as a part of the overall sentencing scheme. Tracking the statutory directive contained in § 994(h), this guideline defines the category of defendants to which it applies as follows:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. The guideline then specifies how these offenders should have their "offense level" calculated:

> If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Id. The guideline table sets the offense level based on the "offense statutory maximum." *Id.* The original guideline defined "Offense Statutory Maximum" as "the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense." U.S.S.G. § 4B1.1, comment. (n.2) (Nov. 1987).

After the Guidelines took effect, some courts applying the career offender provision calculated the "offense statutory maximum" by looking to enhanced statutory maximums based on an individual defendant's

criminal history and the prosecutor's charging decision. *See, e.g., United States v. Smith*, 984 F.2d 1084, 1085 (10th Cir.), *cert. denied*, 510 U.S. 873 (1993); *United States v. Garrett*, 959 F.2d 1005, 1009-11 (D.C. Cir. 1992); *United States v. Amis*, 926 F.2d 328, 329-30 (3d Cir. 1991). These decisions prompted the Commission to amend its commentary to clarify the guidelines' term "offense statutory maximum."

B. The Commission's Amendment of the Career Offender Guideline Reduces Unwarranted Sentencing Disparities.

The Commission, with congressional approval, revised the commentary to § 4B1.1 *via* Amendment 506 in 1994. Amendment 506 arises naturally from the Commission's authority and duty to periodically "review and revise" the Guidelines. 28 U.S.C. §994(o); *see also Braxton v. United States*, 500 U.S. 344, 348 (1991). As this Court has explained: "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton*, 500 U.S. at 348. Amending the Guidelines is an unexceptional, indeed required, part of the Commission's ongoing function.[7]

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[7] It should be noted that the Attorney General, or her designee, is an *ex officio*, nonvoting member of the Commission. 28 U.S.C. § 991. Therefore, the Department of Justice has a front row seat during guidelines policy development, including amendments, and has more opportunity than others to express its concerns about potential amendments, and if not satisfied with the results at the Commission, to bring its concerns to the attention of Congress.

Amendment 506 clarifies that, for the purposes of § 4B1.1, courts should base the offense level on *unenhanced* statutory maximums. U.S.S.G. § 4B1.1, comment (n.2). The Commission explained that this amendment "avoids unwarranted double counting as well as unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions." U.S.S.G. App. C, Amend. 506, at 805 (Nov. 1994), *also published at* Amendment Notice, 59 Fed. Reg. 23,608, 23,609 (1994).

The Commission submitted Amendment 506 to Congress, along with a number of other proposed amendments, on April 28, 1994, and notice of these proposed amendments was published in the Federal Register on May 5, 1994. *See* Amendment Notice, 59 Fed. Reg. 23,608-23,610 (1994).[8] Congress took no action to modify or disapprove the amendment, and it became effective November 1, 1994. *See generally* 28 U.S.C. § 994(p).[9]

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[8] The Commission indicated that original notice of the amendments "was published in the Federal Register of December 21, 1993 (58 F.R. 67,521) [and a] public hearing on the proposed amendments was held in Washington, D.C., on March 24, 1994." Amendment Notice, 59 Fed. Reg. 23,608 (1994).

[9] The "report and wait" procedure that Amendment 506 went through pursuant to § 994(p) provides meaningful Congressional review. For example, Congress has declined to adopt other proposed amendments. *See, e.g.*, Pub. L. No. 104-38, 109 Stat. 334 (rejecting an amendment that would have changed the base offense levels applicable to money laundering offenses and rejecting an amendment that would have equalized the treatment of crack cocaine and powder cocaine).

In 1995, the Commission again fine tuned § 4B1.1. Amendment 528 was added to the "Background" section of § 4B1.1 to clarify that the Career Offender provisions of the Guidelines are based on 28 U.S.C. § 994(a)-(f), and its authority pursuant to § 994(o) and (p), as well as § 994(h). U.S.S.G. App. C, Amend. 528, at 830. *See also United States v. Damerville*, 27 F.3d 254, 256-57 (7th Cir.) (noting that § 4B1.1 stems from the Commission's authority under § 994(a) in addition to its authority under §994(h)), *cert. denied*, 115 S. Ct. 55 (1994); *United States v. Heim*, 15 F.3d 830, 832 (9th Cir.) (same), *cert. denied*, 115 S. Ct. 55 (1994); *United States v. Hightower*, 25 F.3d 183, 186 (3d Cir.) (same), *cert. denied*, 115 S. Ct 370 (1994). By clarifying that § 4B1.1 rests on the Commission's general authority under § 994(a), the Commission underlines its mandate to integrate the demands imposed by § 994(h) with the other guidelines goals and responsibilities.

In addition, Amendment 528 added the following language to the "Background" section of § 4B1.1:

> [T]he Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ." 28 U.S.C. § 991(b)(1)(B).

U.S.S.G. § 4B1.1, comment. (backg'd.) (ellipses in original). The Commission also indicated its position that its amendments to this section were in line with congressional

intent, noting:

> The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Id. (bracketed information in original). This amendment elucidates the Commission's position with respect to its authority to structure the Career Offender provision as it has, and its understanding that its actions comport with the legislative mandate and legislative intent.

II. Amendment 506 Does Not Violate Any Federal Statute and Constitutes a Legitimate Exercise of the Sentencing Commission's Authority and Expertise.

Amendment 506 does not violate 28 U.S.C. § 994(h), or any other federal statute, and the amended commentary should be accorded controlling weight. *Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913, 1919 (1993). The two-part analysis from *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), supports this conclusion.

The Government can only impose its view of how to calculate the sentences of "career offenders" by pointing to an unambiguous expression of congressional intent that mirrors its view. *Chevron*, 467 U.S. at 842. This it cannot do. In fact, the Commission's "alternative" interpretation of the statutory mandate reflects a reasoned approach that integrates the directive contained in § 994(h) with the Sentencing Reform Act's other mandates. In short, the Commission accomplished exactly what Congress hoped it would,"a consistent and rational implementation of the [legislature's] view that [certain repeat offenders receive] substantial prison terms." S. Rep. No. 225, 98th Cong., 2d Sess. 175 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3358.

A. Amendment 506 Does Not Violate Unambiguously Expressed Congressional Intent.

The language of § 994(h) does not answer "the precise question[s] at issue[,]" *Chevron*, 467 U.S. at 842, that is, whether the call to sentence certain "categories of defendants" "at or near the maximum term authorized" requires the guidelines to be written in such a way as to assure that, if the prosecutor chooses to charge a given defendant with statutory enhancements, those statutory enhancements will serve as the basis for that defendant's "offense level" within the "career offender" guideline. The Government's position that this is, unambiguously, the only interpretation of § 994(h) does not withstand scrutiny.

The Commission's approach to calculating the offense level of "career offenders" constitutes a thoroughly reasonable means of implementing the directive to sentence certain "categories of defendants" "at or near the maximum term authorized." The existence of this compelling "alternative" interpretation of the statutory mandate indicates that the intent of Congress is not clear.

As the First Circuit noted, the "categories of defendants" at issue could be comprised of "those defendants charged with violations of similar statutes against whom prosecutors have filed notices of intention to seek sentence enhancements[,] *United States v. LaBonte*, 70 F.3d 1396, 1404-05 (1st Cir. 1995), *cert. granted*, 116 S. Ct. 2545 (1996), or "[t]he word 'categories' plausibly can be defined more broadly to include all offenders (or all repeat offenders) charged with transgressing the same criminal statute, regardless of whether the prosecution chooses to invoke the sentence-enhancing mechanism against a particular defendant[,]" 70 F.3d at 1405. A third interpretation would be that Congress intended comparable treatment for those "categories of defendants" charged with *either* a violent felony *or* a serious drug offense, who had previously been charged with two or more qualifying felonies.[10]

Nor is it self-evident, as the Government urges (Pet.

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[10] This interpretation, which directly tracks the statutory language, also serves the end of reducing unwarranted sentencing disparities among those defendants with comparable records found guilty of similar, or comparable, criminal conduct, as required by 28 U.S.C. § 991(b)(1)(B). *See* discussion *infra* part II.B.

Br. at 18), that the phrase, "at or near the maximum term authorized," *requires* the Guidelines to identify a career offender's "offense level" based on the "enhanced" statutory maximum. A similar argument was considered and rejected in *United States v. R.L.C.*, 503 U.S. 291 (1992). In that case, the Government asserted that the term "authorized" was unambiguous and "refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines[.]" *R.L.C.*, 503 U.S. at 297. The Court disagreed, stating that the Government's position "beg[s] the question," explaining: "The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory." 503 U.S. 291, 297 (1992) (citing 18 U.S.C. § 3553(b)).

As in *R.L.C.*, this case involves two potentially conflicting mandates, one derived from a statute, and one based in the Guidelines. In *R.L.C.*, the Court framed the issue before it aptly: "The question . . . is whether Congress intended the courts to treat the upper limit of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult case would bar imposition up to the limit[.]" 503 U.S. at 297. In ruling against the Government in *R.L.C.*, the Court concluded:

> Here, it suffices to say that the Government's construction is by no means plain. The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power.

503 U.S. at 298. Similarly, in this case, the "plain meaning" of the statutory directive to assign sentences at or near the "maximum term authorized" does not patently require that a career offender's "offense level" be based on an enhanced statutory maximum. Although the Government might like this to be the case, it is far from obvious that Congress intended this interpretation.

In sum, it cannot be said that the congressional mandate contained in § 994(h) "unambiguously expressed [the] intent of Congress." *Chevron*, 467 U.S. at 843.

B. Amendment 506 Embodies a Thoroughly Reasonable and Coherent Construction of the Statutory Directive Regarding Certain Recidivist Defendants.

Amendment 506 reflects a sensible and uniform approach to the sentencing of those designated as career offenders. Further, so long as this amendment is based on a "permissible construction of the statute[,]" it must be upheld. *Chevron*, 467 U.S. at 843.

Not only is the Commission's interpretation permissible, it provides the only means of assuring compliance with the statutory mandate to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 28 U.S.C. § 991(b)(1) (B). Because of the many

options available to prosecutors -- bringing, enhancing or reducing charges -- they are able to introduce unwarranted disparity into sentencing outcomes. Thus, the exercise of prosecutorial discretion frequently results in offenders with like records and similar culpability receiving different sentences, the anathema of sentencing reform.

One need look no further than the Sentencing Reform Act itself to see that Congress was concerned that prosecutorial discretion would perpetuate unjustified disparities in the treatment of similarly situated persons. Congress expressly expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. Rep. 98-225, 98th Cong. 1st Sess. 63, 167 (1983). The Sentencing Commission, in response to the congressional directive in 28 U.S.C. § 994(a)(2)(E), advises judges not to accept charge bargains unless it is determined, "for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." U.S.S.G. § 6B1.2(a).

The Government's reading of § 994(h) amplifies the virtually unreviewable prosecutorial discretion to determine sentences and undermine the Sentencing Guidelines. Professor Schulhofer and former Commissioner Nagel warn that "it is ... important to recognize the sentencing discretion which remains in the prosecutorial hands. If abused and unchecked, this discretion has the potential to create the disparities that sentencing reform was intended to prevent." Stephen Schulhofer & Ilene Nagel, *Negotiated Pleas Under*

the Federal Sentencing Guidelines: The First Fifteen Months, 27 Am. Crim. L. Rev. 231, 232 (1989). If the Guidelines did not base a career offender's "offense level" on the unenhanced statutory maximum, then two defendants, both convicted of a drug offense and having two prior qualifying felonies, at least one being a drug offense, could be treated entirely disparately based upon the prosecutor's whim. This differential treatment flies in the face of the congressional directive to avoid unwarranted sentencing disparities.

Amendment 506 eliminates other unwarranted disparities beyond those associated with prosecutorial discretion. For example, under the Government's interpretation of § 994(h), a defendant who was convicted for a third qualifying drug offense could receive an "offense level" based on an enhanced statutory maximum, while a defendant who was convicted of the same drug offense, who had previously been convicted of two violent felonies, would receive an "offense level" based on an unenhanced statutory maximum.

This differential treatment conflicts with the language of § 994(h) which mandates certain treatment for "categories of defendants in which the defendant" meets certain criteria. This section does not simply direct treatment for "defendants who" meet these criteria. This choice of language suggests that Congress expects these "categories of defendants" to receive comparable treatment under the Guidelines. That is, Congress directed that the Guidelines mete out equal treatment to those "categories of defendants" who are convicted of a crime of violence, and have two prior

convictions for controlled substances offenses, and those "categories of defendants" who are convicted of a third controlled substances offense. Interpreted in this manner, the Commission has done exactly what Congress intended.

Contrary to the Government's position, the Guidelines, in this case, fully satisfy the congressional objectives of substantial penalties for repeat offenders and consistency in treatment of those offenders who commit comparable crimes and who have comparable criminal histories.

Aside from the "reasonableness" of Amendment 506, that amendment protects defendants from unfair double counting. If the Government's position were adopted, a defendant subject to the Career Offender provision would have his criminal history counted against him twice -- first *via* a statutory enhancement and then by the automatic "enhancements" triggered by the career offender guideline. Such treatment is overly harsh, particularly considering that the Career Offender provision standing alone is strong medicine.[11] Requiring double counting may well violate the congressional mandate to insure that sentences imposed are "sufficient, but not greater than necessary," 18 U.S.C. §3553(a), to achieve the stated purposes of sentencing. Further, the Commission's interpretation of the Guidelines

[11] For example, a non-career offender with a criminal history Category III, who is held responsible for the distribution of 35 grams of cocaine base (offense level 30), has a guideline range of 121-151 months. By comparison, the guideline range applicable to a similarly-situated defendant who is designated a career offender is 262-327 months. *See* U.S.S.G. § 4B1.1.

allows for imposition of significant penalties based on career offender status while also providing a more individualized means of tailoring a sentence to the offense committed and the defendant's role in that offense.[12]

Finally, as noted above, § 4B1.1 was formulated to address a range of congressional objectives, beyond the dictates of § 994(h). *See* U.S.S.G. § 4B1.1, comment. (backg'd.). Consequently, the competing aims of eliminating unwarranted disparities, cabining prosecutorial discretion, not exceeding the capacity of the federal prisons, and achieving greater fairness and certainty, all must enter the Commission's calculus in formulating the Guidelines, including the Career Offender provision.

Where, as here, the Commission received congressional approval for Amendment 506, and where the amended commentary represents a rational implementation of the legislative mandate, and does not violate the Constitution or any federal statute, nor conflict with the guideline it interprets, that commentary governs. *Stinson*, 113 S. Ct. at 1919.

[12] The guidelines provide for individualized assessments of liability for offense characteristics, adjustments related to the victim, defendant's role, and any obstruction of justice, acceptance of responsibility and substantial assistance to the Government. Further, in cases in which a sentencing judge determines that the guidelines calculation does not adequately represent the relevant aggravating and mitigating circumstances, he or she may depart from the guidelines. 18 U.S.C. § 3553(b).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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September 20, 1996

VIA FAX

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Washington, DC 20006

Dear Ms. Stewart:

Thank you for your letter of September 9, 1996 to Chairman Conaboy concerning the Sentencing Commission's possible intervention in United States v. LaBonte, a case currently before the United State Supreme Court in which the Government contests the validity of Amendment 506 to the sentencing guidelines. Chairman Conaboy asked me to respond to your letter.

The Sentencing Commission continues to have a keen interest in this matter. It has received several briefings from its Counsel at various stages of the litigation, including, most recently, an update at its September 19 meeting. At the early stages of this litigation, the Commission authorized its Counsel to informally advise and consult with attorneys advocating the validity of the amendment. Pursuant to this direction, our legal staff has had a number of substantive

discussions with counsel representing defendants impacted by Amendment 506, including counsel involved in the cases in which *certiorari* has been granted.

Based on these discussions, we have every confidence that the important issues in these cases will be well developed and effectively presented to the Court. Moreover, there appears to be no significant divergence of interests between the individual defendants and the Commission in regard to the validity of this particular amendment. Thus, the Commission has not felt it necessary to pursue formal intervention in this litigation.*

Thank you for your interest in this important issue.

Sincerely,

/s/

John R. Steer
General Counsel

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*The Sentencing Commission has always acknowledged the authority of the Attorney General under 28 U.S.C.§ 516, et. seq, in respect to litigation in which the United States is a party. With the permission of the parties and the Court, the Commission participated as an *amicus* in Mistretta v. United States, 488 U.S. 361 (1989), when the constitutionality of the Commission and the guideline system was at stake. Subsequently, the Commission has filed *amicus* briefs, with the permission of the Attorney General or through the Department of Justice, in a very limited number of cases involving the guidelines. The fact that the Commission's interests appear to be ably advanced by counsel for the defendants in these particular cases obviates any need to address procedural issues relating to possible Commission participation in this litigation.

No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER, Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the First Circuit

RESPONDENT DYER'S POST-ARGUMENT MOTION
TO DISMISS THE WRIT, AS TO HIM, AS IMPROVIDENTLY GRANTED

Respondent Dyer moves this Court to dismiss the writ, as to him, as improvidently granted, because the judgment of the court below would have to be affirmed regardless of this Court's ruling on the Question Presented. The factual basis for the instant motion is not applicable to respondent LaBonte or respondent Hunnewell, who therefore do not join in this motion.

1. This Court granted certiorari in this case to decide whether the U.S. Sentencing Commission violated its obligations under 28 U.S.C. § 994(h) when it adopted Amendment 506 to the United States Sentencing Guidelines. Amendment 506 revised the commentary accompanying the Career Offender Guideline, USSG § 4B1.1, to define "offense statutory maximum" so as to disregard enhancements to offense maximums triggered solely by a

defendant's prior convictions. Underlying the Question Presented and included within it is the question whether the courts must accord deference to the Sentencing Commission's interpretation and implementation of its governing legislation, the Sentencing Reform Act, whenever the Act is either silent or ambiguous. Oral argument was held yesterday, January 7, 1996.

2. In preparation for argument (and not before) counsel for respondent Dyer realized that the validity vel non of Amendment 506 under 28 U.S.C. § 994(h) does not affect his eligibility for a sentence reduction under that amendment.[1] Rather, Dyer was sentenced as a career offender because the Commission elected to go beyond the requirements of § 994(h) in defining the offenses that trigger career offender status under USSG § 4B1.1. See USSG § 4B1.2 & comment. (nn. 1-2). In doing so, it exercised authority (if it had any such authority at all, see Resp.Br. at 17 & n.10) not under the specific mandate of 28 U.S.C. § 994(h) but under Congress's general grant of power to the Commission to design sentencing guidelines.

3. Section 994(h) directed the Sentencing Commission to devise a guideline that would push up to a near-maximum level the sentences of those offenders who stood convicted of certain offenses "described in" one of five specified federal drug statutes (or of a "crime of violence"), and who had previously

[1] Undersigned counsel was appointed by this Court after certiorari was granted. Dyer was represented by retained counsel in the court of appeals, who did not advance the argument contained in this motion. Dyer represented himself in opposition to the government's certiorari petition and also failed to make the point advanced in this motion.

been convicted of at least two such drug or violent offenses.[2] Respondent Dyer's current offense, conspiracy in violation 21 U.S.C. § 846, is not an offense "described in" any of those provisions (nor is it a "crime of violence"). Resp. Br. 18 & n.11; see also U.S. Br. 10; Pet. Appx. 9a.

4. The circuits which permit the inclusion of drug conspiracy offenses as countable under the "career offender" guideline at all uniformly hold that the Commission's authority to do so derives not from 28 U.S.C. § 994(h) itself but rather from § 994(a) and other, more general authority of the Commission. See, e.g., United States v. Hightower, 25 F.3d 182 (3d Cir.), cert. denied, 115 S.Ct. 370 (1994). The government apparently agrees. Reply Br. 6-7 n.5. Thus, in respondent Dyer's case, the answer to the question whether Amendment 506 conforms with § 994(h) has no bearing on whether he can benefit from that amendment. For cases in which Career Offender sentencing is not mandated by the terms of § 994(h), the Commission's decision as to what such sentences should be cannot be invalidated by reference to any limitations of that provision.

5. For this reason, regardless of the Court's answer to the Question Presented, the district court had power under 18 U.S.C. § 3582(c) to resentence respondent Dyer on the basis of

[2] The drug offenses specified in § 994(h) are violations of 21 U.S.C §§ 841, 952(a), 955 and 959, and of 46 U.S.C. Appx. § 1901 et seq. See Pet. Appx. 114a; U.S. Br. 21a-22a.

Amendment 506.[3] The judgment of the court below was therefore correct in any event.

WHEREFORE, as to respondent Dyer, the writ was improvidently granted and should be dismissed. In the alternative, if this Court reverses the judgment of the court below, his case, at least, should be remanded to the court of appeals for consideration of whether Amendment 506 nevertheless is valid as applied to persons, such as respondent Dyer, who are classified as career offenders only by virtue of the Sentencing Commission's expansion of that category beyond the minimum requirements of 28 U.S.C. § 994(h).

Respectfully submitted,

Dated: January 8, 1997

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(610) 649-8200
Counsel for Respondent Dyer

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[3] The Commission declared Amendment 506 to be retroactively enforceable under 18 U.S.C. § 3582(c). USSG § 1B1.10(c) (p.s.).

IN THE SUPREME COURT OF THE UNITED STATES

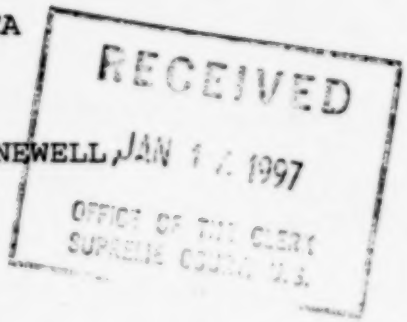
OCTOBER TERM, 1996

No. 95-1726

UNITED STATES OF AMERICA

v.

GEORGE LABONTE, LAWRENCE HUNNEWELL
AND STEPHEN DYER



ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION
TO RESPONDENT DYER'S MOTION TO DISMISS THE WRIT
AS IMPROVIDENTLY GRANTED

The question presented by the petition for a writ of certiorari in this case is whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories" of career offenders. Section 994(h) provides that the Commission shall assure guidelines sentences "at or near" the statutory maximum for offenders convicted of specific offenses, including controlled substances offenses defined by 21 U.S.C. 841, but not including the offense of conspiracy to commit a controlled substance offense defined in 21

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U.S.C. 846. The Commission has nevertheless provided that defendants convicted of drug conspiracy who satisfy the other requirements of the Career Offender Guideline are covered by that Guideline. See Guidelines § 4B1.2, Application Note 1 ("The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

In a post-argument motion, respondent Stephen Dyer asserts for the first time that certiorari was improvidently granted as to him because he qualified as a career offender solely on the basis of his conviction for conspiracy to commit a controlled substance offense, in violation of 21 U.S.C. 846. Thus, he contends, because he is not in a category of defendants for whom Section 994(h) mandates a guidelines sentence "at or near" the statutory maximum, the Court's resolution of the issue in this case will have no effect on his sentence. Respondent's motion should be denied.

1. As an initial matter, respondent's contention is not properly raised at this time. Respondent did not raise this issue in the district court, and he concedes (Motion at 2 & n.1) that he did not raise it in the court of appeals or in opposition to the government's petition for certiorari. Nor did the court of appeals address respondent's current claim; rather, it upheld Amendment 506 on the basis that that amendment is consistent with Section 994(h). This Court will consider arguments in support of the lower court's judgment that were not advanced below "'only in exceptional cases.'" Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38-39

(1989) (quoting Heckler v. Campbell, 461 U.S. 458, 468-469 n.12 (1983)); see also Ryder v. United States, 115 S. Ct. 2031, 2036 n.4 (1995); United States v. Alvarez-Sanchez, 511 U.S. 350, 360 n.5 (1994); Air Courier Conf. v. American Postal Workers Union, 498 U.S. 517, 522-523 (1991). Respondent has failed to identify any exceptional circumstance applicable to this case. Respondent sought a reduction in sentence when the Commission promulgated Guidelines Amendment 506. The government opposed respondent's request for resentencing solely on the ground that Amendment 506 is inconsistent with Section 994(h). Thus, respondent had every incentive in the district court and on appeal to claim that he did not fall within the scope of Section 994(h). See United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977). His failure to make that argument below precludes him from raising it for the first time now.

2. Respondent's motion should also be denied because it rests on an erroneous premise. Respondent contends (Motion at 3-4) that his eligibility for a sentence reduction under Amendment 506 does not depend on this Court's resolution of the question presented in this case. That premise is incorrect, however, because the government's petition for certiorari seeks the invalidation of that amendment altogether, not as applied to specific cases. Thus, if the government prevails in this Court, the commentary to the Guidelines added by Amendment 506 will have no continuing legal force, and the basis on which respondent sought a reduction in sentence will no longer exist. The result will be that Guidelines

§ 4B1.1 will exist as it did before Amendment 506, i.e., that it will require that the sentence of a career offender be determined by using the maximum term authorized by statute for him, not the maximum term authorized for a defendant with no prior convictions. See U.S. Br. 5-6 (collecting cases).

Respondent asserts (Motion at 3-4) that, regardless of the Court's resolution of this case, "the district court had power under 18 U.S.C. § 3582(c) to resentence [him] on the basis of Amendment 506." That argument assumes, however, that if the Court ruled for the government, it would rewrite the language of Guidelines § 4B1.1, Application Note 2, to include only those career offenders not specified in Section 994(h). This Court ordinarily declines the task of rewriting statutes it finds invalid, see United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1019 (1995), and respondent provides no reason to applying a different practice to the Sentencing Guidelines. Indeed, if the Court were to rule in the government's favor, it would be particularly inappropriate for the Court to rewrite the Career Offender Guideline to exempt persons in the position of respondent Dyer. In applying the Career Offender Guideline to defendants convicted of drug conspiracy offenses as well as to defendants convicted of substantive violations of 21 U.S.C. 841, the Commission's purpose was to avoid unwarranted sentencing disparities between similarly situated offenders. See Amendment 528 to the Guidelines (effective Nov. 1, 1995); see also S. Rep. No. 225, 98th Cong., 1st Sess. 176 (1983) (noting that Section

994(h) was not "necessarily intended to be an exhaustive list * * * of types of cases in which the terms at or close to authorized maxima should be specified"); U.S. Reply Br. 6 n.5. It would defeat the Commission's purpose if the Career Offender Guideline were redrafted so as to specify different (and more lenient) treatment for drug conspiracy defendants who are to be sentenced as career offenders.

3. Finally, even if it were proper to consider severing applications of Amendment 506 to defendants described in Section 994(h) from other defendants and striking it down only as to the defendants specified in Section 994(h), Dyer's motion should be denied. Amendment 506 is explicitly premised on the view that "unwarranted" disparities arise from the variations in the exercise of prosecutorial discretion in the filing of notices of prior conviction under 21 U.S.C. 851. See U.S. Br. App. 36a (quoting Amendment 506) ("This rule avoids * * * unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions."). The Commission, however, does not have power to disagree with and effectively nullify the exercise of discretion that Congress has placed in the hands of federal prosecutors. Prosecutorial discretion is a legitimate and necessary aspect of criminal law enforcement, see United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996); Wayte v. United States, 470 U.S. 598, 607 (1985), and the Sentencing Commission was not charged with eliminating its effects. Accordingly, such disparities as may flow

from a prosecutor's decision to file a Section 851 notice in one case but not another are not "unwarranted." Because the Commission's rationale for Amendment 506 conflicts with the discretion that Congress has placed in the hands of prosecutors through 21 U.S.C. 851, the application of that amendment is invalid even as to a person in respondent Dyer's position.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

USA Petitioner	)	
vs.	)	No. 95-1726
GEORGE LABONTE, LAWRENCE HUNNEWELL, AND STEPHEN DYER	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO RESPONDENT DYER'S MOTION TO DISMISS THE WRIT AS IMPROVIDENTLY GRANTED** by first class mail, postage prepaid, on this 14th day of January 1997.

Walter Dellinger /cs
WALTER DELLINGER
Acting Solicitor General

January 14, 1997

See Attached List

January 14, 1997

Attachment List for Case No. 95-1726

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No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARGUED
JAN 7 1997

UNITED STATES OF AMERICA, Petitioner,

v.

GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER, Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the First Circuit

RESPONDENT DYER'S REPLY TO MEMORANDUM IN OPPOSITION TO HIS MOTION TO DISMISS THE WRIT AS IMPROVIDENTLY GRANTED

Respondent Dyer has moved this Court to dismiss the writ, as to him, as improvidently granted, because the judgment of the court below would have to be affirmed regardless of this Court's ruling on the Question Presented.

1. The United States opposes the motion to dismiss by reference to this Court's cases limiting the circumstances under which a respondent may seek affirmance on alternate grounds. Mem. Opp. at 2-3. Our motion does suggest that affirmance on the stated alternate ground would be appropriate if dismissal of the writ is denied, but that is not the relief the motion primarily seeks. A suggestion for dismissal of the writ as improvidently granted, on the basis that an alternate ground of affirmance has belatedly appeared, does not present the same

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considerations in a precedent-setting Court with a discretionary docket as does a request to affirm on the merits on a ground other than that which the Court agreed to review on certiorari. See Robert L. Stern, Eugene Gressman, et al., Supreme Court Practice § 5.15, at 260 (7th ed. 1993). The prudential concerns presented by the present motion are therefore not like those involved in the cases cited by the government, where a respondent seeks a ruling from this Court on the merits of an issue either not developed or even waived in the lower courts, or on which certiorari could have been but was not granted. Necessarily, this Court exercises a certiorari-like discretion whether to entertain such arguments.

2. While the United States may be "seek[ing] invalidation" of Amendment 506 "altogether, not as applied to specific cases," Mem. Opp. at 3, respondent Dyer's present motion shows that the Amendment is not even arguably invalid as to some cases, such as his. The Court would have no warrant in striking down the Amendment as applied to such cases. But even if the government's all-or-nothing position is arguable, that is not the argument this Court agreed to resolve when it granted certiorari in LaBonte. The government's Memorandum thus shows not that our motion should be denied, but rather confirms that, as to Dyer, the writ should be dismissed.

If this Court holds the definitional commentary to USSG § 4B1.1 invalid under 28 U.S.C. § 994(h) (which, of course, we argue it should not), it will still be for the Commission, not the Court, to decide how to define the "categories" that should

then be deemed to fall within certain guideline ranges, and thus which career offenders should be treated alike and which differently, as well as to decide what terminology to use in that guideline and how those terms should be defined. See Stinson v. United States, 508 U.S. 36 (1993). Thus, as we argued in Point III of our brief, we agree that the Court should not rewrite a guideline that it finds invalid. If the government prevails in this case, by invalidating the definition of a key term the Commission used in USSG § 4B1.1, the Court will (under Stinson) have struck down the guideline as to those affected by the invalidity. This Court need not be concerned with how the career offender guideline should then be "redrafted," Mem. Opp. at 5; that task will be for the Commission, in its expertise and discretion, to undertake.

3. The government's final contention in opposition to respondent Dyer's motion seeks to recast and reargue the merits of the petitioner's case in an even more extravagant form than in its brief or at argument. These contentions are misguided in several important respects.

a. First, because the Sentencing Commission is not required by 28 U.S.C. § 994(h) (or any other statutory provision) to treat as career offenders defendants, such as respondent Dyer, convicted only of conspiracy, any restrictions imposed by § 994(h) are not applicable to such defendants. The Commission is not required by any law to link sentences for defendants convicted of conspiracy to statutory maximums at all. The Commission can use any formula it chooses to determine the

applicable guideline range for such defendants. The Commission's decision that sentences for such defendant will be based on the greater of the normal guideline range applicable to the defendant or a career offender level pegged to the unenhanced statutory maximum is a matter solely within the Commission's discretion and authority under 28 U.S.C. § 994(a).

b. Second, the government's broader point, that "Prosecutorial discretion is a legitimate and necessary aspect of criminal law enforcement, and the Sentencing Commission was not charged with eliminating its effects" (Mem. Opp. at 5, citing no authority), is wrong and misleading. In enacting the Sentencing Reform Act, Congress was concerned with sentencing disparity, whatever the cause, and charged the Sentencing Commission with determining what sorts of disparity are "unwarranted." Congress was specifically concerned, inter alia, with the effects of prosecutorial discretion and the ability of prosecutors to "undermine" the sentencing guidelines. S. Rep. No. 98-225, 98th Cong. 1st Sess. 63 (1983). As a result, Congress included in the Sentencing Reform Act a directive to the Sentencing Commission to issue policy statements regarding a court's authority to accept or reject a plea agreement. 28 U.S.C. § 994(a)(2)(E).

The Sentencing Commission has also taken a series of steps, central to the guidelines, to reduce the effect of prosecutorial discretion. These include the relevant conduct rules of USSG § 1B1.3, the rules calling generally for concurrent sentences regardless of the number of counts charged (USSG §§ 5G1.2(c),

5G1.3(b)[1]), and the grouping rules of chapter 3, part D. They also include the many "real offense" modifications of the guidelines' "conviction offense" starting point, and the encouragement of departures to nullify the effects of the prosecutor's "inappropriate manipulation of the indictment." USSG, ch. 1, pt. A(4)(a).[2]

The point is not that prosecutorial discretion is invalid. Like judicial discretion, prosecutorial discretion is lawful and generally appropriate. However, a guideline system that ignored otherwise-lawful prosecutorial discretion as a source of unwarranted disparity would make no more sense than a system that ignored and failed to control judicial discretion. Adoption of the government's position, as stated in its Memorandum in Opposition, would severely undermine the entire guidelines system and cripple the Commission's legitimate authority.

c. Under Amendment 506, prosecutors retain unfettered discretion to decide whether to seek an enhanced maximum under 21 U.S.C. § 851, but that section does not and never did operate to require a judge in any case to impose a higher sentence. And even if this Court reverses the First Circuit, the Sentencing

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[1] The propriety of these guidelines in their restraining effect on lawful prosecutorial charging decisions was discussed by this Court with approval in United States v. Witte, 515 U.S. --, 115 S.Ct. 2199, 132 L.Ed.2d 351, 366-67 (1995).

[2] See generally Resp. Br. 13-14 & nn. 5-6; U.S. Sent. Comm'n, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining (December 1991).

Commission is not bound to base sentences on such enhanced maximums for defendants not required to be defined as career offenders by 28 U.S.C. § 994(h). If the prosecutor has the ability, in effect, to mandate a sentence at or near the enhanced maximum, this power comes only from § 994(h) (this is the question presented to the Court in this case). Where § 994(h) does not apply, the Sentencing Commission's decision to base sentences on unenhanced maximums interferes with no power even arguably given to the prosecutor.

For these reasons, as suggested in respondent Dyer's motion, the writ was improvidently granted and should be dismissed as to him.

Respectfully submitted,

Dated: January 15, 1997

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Counsel for Respondent Dyer

Of Counsel:
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No. 95-1726

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL, AND STEPHEN DYER, Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the First Circuit

CERTIFICATE OF SERVICE

Pursuant to this Court's Rules 29.2 and 29.5(b), I certify that I am a member of the Bar of this Court, representing the respondent Dyer by appointment of this Court pursuant to 18 U.S.C. § 3006A(d)(6). I further certify that:

1. On January 15, 1997, I submitted the original of the Respondent's Reply to Memorandum in Opposition to Motion to Dismiss the Writ by facsimile and first class mail, properly addressed to the Clerk of this Court, for filing.

2. I further certify that on January 15, 1997, at the time of submission for filing, as permitted by Rule 29.3, I served Respondent Dyer's Reply on counsel for the petitioner, the

United States, Michael Dreeben, Esquire, Deputy Solicitor General, whose telephone number is 202-514-4285, by fax (202-307-4613) and first class mail, postage prepaid, addressed to:

Michael Dreeben, Esquire,
Deputy Solicitor General
Malcolm L. Stewart, Esquire
Assistant to the Solicitor General
U.S. Dept. of Justice, rm. 5614
10th St. & Constitution Ave., NW
Washington, DC 20530

A copy was also sent by first class mail to each attorney of record for the other respondents, as follows:

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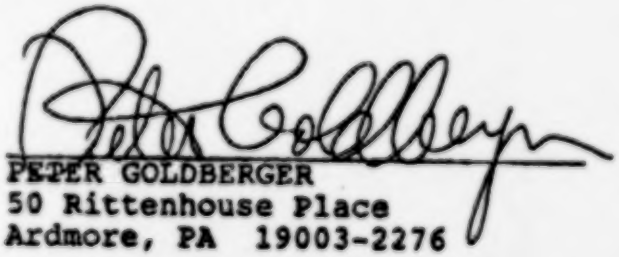
Attorney for Alfred Hunnewell

As a result, I state pursuant to Rule 29.5 that all parties required to be served have been served.



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